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IN THE

Supreme Court of the United States

October Term, 1957

No. 316

HELEN E. COTTRELL,

Appellant,

v.

THE PAWCATUCK COMPANY (formerly the C. B. Cottrell & Sons Company), a Delaware Corporation (known as the Old Company), HARRIS-SEYBOLD COMPANY, a Delaware Corporation, DONALD C. COTTRELL, RIDLEY WATTS, ARTHUR M. COTTRELL, JR., CHARLES P. COTTRELL, JR., and THE COTTRELL COMPANY, a Delaware Corporation (known as the New Company),

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF DELAWARE

JURISDICTIONAL STATEMENT

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IN THE

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October Term, 1957

No. .

HELEN E. COTTRELL,

Appellant,

v.

THE PAWCATUCK COMPANY (formerly the C. B. Cottrell & Sons Company), a Delaware Corporation (known as the Old Company), HARRIS-SEYBOLD COMPANY, a Delaware Corporation, DONALD C. COTTRELL, RIDLEY WATTS, ARTHUR M. COTTRELL, JR., CHARLES P. COTTRELL, JR., and THE COTTRELL COMPANY, a Delaware Corporation (known as the New Company),

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF DELAWARE

Jurisdictional Statement

Appellant appeals from the judgment and mandate of the Supreme Court of the State of Delaware, entered on January 24, 1957, affirming the judgment of the Court of Chancery of the State of Delaware in and for New Castle County and submits this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

Opinions Below

The opinion of the Supreme Court of the State of Delaware is reported in 128 A. 2d 225. The opinion of the Court of Chancery is reported in 116 A. 2d 787. Copies of the above opinions and judgments thereon are attached hereto as Appendix A.

Jurisdiction

This suit was brought by a substantial minority interest to enjoin the sale of the corporate assets of the C. B. Cottrell & Sons Company (now The Pawcatuck Company), a corporation of the State of Delaware. The judgment of the Court of Chancery of the State of Delaware was entered on October 4, 1955. The judgment and mandate of the Supreme Court of the State of Delaware was entered on January 24, 1957. The jurisdiction of the Supreme Court of the United States to review this decision by appeal is conferred by 28 United States Code, Section 1257(2).

It is believed that the following cases sustain jurisdiction of the Supreme Court of the United States:

Dahnke-Walker Milling Co. v. *Bondurant*, 257 U. S. 282;

Largent v. *Texas*, 318 U. S. 418.

Questions Presented

1. Whether the Delaware statute, 8 Del. C. § 271, enacted in 1917, is unconstitutional in violation of Article I, Section 10, of the United States Constitution, prohibiting any law impairing the obligation of contracts, or the due process clause of the 14th Amendment of the United States Constitution, as applied in this case to appellant, a dissenting

stockholder, insofar as it authorizes a sale of all of the assets of a Delaware corporation organized in 1914 upon such terms as its board of directors deems expedient when authorized by the affirmative vote of the holders of the majority of the voting stock of the corporation?

2. Whether the refusal of the Supreme Court of Delaware to pass upon the constitutionality of the above mentioned Delaware statute on the ground that this legal question, not dependent upon the trial and determination of any factual issues, was not raised, argued and decided in the trial court, unconstitutionally deprives appellant of due process of law and equal protection of the laws in violation of the 14th Amendment of the United States Constitution?

Statement

Nature of Proceeding

The appellant, plaintiff below, brought this action on December 4, 1953, as a minority stockholder of C. B. Cottrell & Sons Company, a Delaware corporation (hereafter called the "Old Company"), to enjoin a sale of all of its operating assets under an agreement dated November 9, 1953. After the filing of the action, the name of the corporation was changed to The Pawcatuck Company. When the complaint was filed, the purchaser under the agreement was Harris-Seybold Company (hereafter called "Harris"). Harris assigned the agreement to a wholly owned subsidiary (hereafter called the "New Company"). The sale was consummated on December 10, 1954. The New Company was added as a defendant. All of the corporate defendants are Delaware corporations.

The complaint seeks rescission of the contract and restoration of the status quo. It also seeks, as alternative relief, damages against all the individual defendants, Harris and the New Company.

The relief sought is based upon the premise that the price of $3,553,997.33 specified in the agreement of November 9, 1953, was grossly inadequate and that the agreement had been entered into by the Old Company, through its majority directors and majority stockholders, in reckless disregard of and deliberate indifference to the rights of the minority stockholders.

A temporary restraining order was granted, and a rule was issued to show cause why a preliminary injunction should not be granted. The restraining order was vacated and the preliminary injunction denied on December 8, 1953. Answers were filed. A supplemental complaint was filed on September 16, 1954. Answers to it by the original defendants and the New Company were filed. A final hearing was had and plaintiff was denied relief. 116 A. (2d) 787.

How the Federal Question Arose

Plaintiff appealed to the Supreme Court of Delaware from the final order of the Chancellor of October 4, 1955, dismissing the action. As is the Delaware practice, plaintiff raised her questions on appeal not by assignment of errors but by her first brief, and in this brief she raised, for the first time in this case, the question as to whether 8 Del. C. § 271 was unconstitutional under the Delaware and United States Constitutions as applied to her, a dissenting stockholder of a corporation formed prior to its enactment. The question was further elaborated in her reply brief. (Note: The full texts of these briefs on this question appear in Appendix B of this Jurisdictional Statement. The Supreme Court of Delaware affirmed the judgment of the Court of Chancery by judgment and mandate dated January 24, 1957. In its opinion it denied the plaintiff the right to raise the question of constitutionality for the first time on appeal. 128 A. 2d 225, at 233. Plaintiff appealed from this judgment to the Supreme Court of the United States on April 23, 24, 1957. (Note: The Notice of Appeal was filed with both the Supreme

Court of the State of Delaware, on April 24, 1957, and the Court of Chancery of the State of Delaware, on April 23, 1957, as each had differing but pertinent parts of the record to be certified to the Supreme Court of the United States.)

Background

C. B. Cottrell & Sons Company was one of the oldest and best known manufacturers of printing presses. It was begun in 1855. In 1893 the partnership of the Cottrells was incorporated in New Jersey and in 1914 reincorporated under the laws of Delaware with a capital of $1,600,000, comprising 8,000 shares of common stock and 8,000 of preferred, each with the par value of $100 per share. All the stock was issued.

In 1953, the year of sale, the corporation was profitably engaged in the manufacture of printing presses as one of the major producers in that industry. Its customers included the best known publishing and industrial firms in the country. Aside from its normal operations, it was, and had been for three years, engaged in manufacturing rocket motors, nozzles and assemblies for the United States Navy.

Harris produces equipment for the graphic arts industry, and is one of the world's largest manufacturers of offset printing presses and power paper cutters. In 1953 Harris was aggressively interested in acquiring new companies so that it would have products that covered the entire graphic arts machinery field.

Statutes Involved

8 Del. C. § 271. *Sale, lease or exchange of assets; consideration; procedure.*

Every corporation organized under the provisions of this chapter, may at any meeting of its board of directors, sell, lease or exchange all of its property and assets, including its good will and its corporate franchises, upon such terms and conditions and for such consideration, which may be in whole or in part shares of stock in, and/or other securities of, any other corporation or corporations, as its board of directors deems expedient and for the best interests of the corporation, when and as authorized by the affirmative vote of the holders of a majority of the stock issued and outstanding having voting power given at a stockholders' meeting duly called for that purpose, or when authorized by the written consent of the holders of a majority of the voting stock issued and outstanding. The certificate of incorporation may require the vote or written consent of the holders of a larger proportion of the stock issued and outstanding.

Questions Are Substantial

First, this is the era of large numbers of corporate combinations either directly by merger or purchase of another's assets. It is of vital importance to the corporation law generally, and particularly to the thousands of Delaware corporations organized prior to 1917, doing business throughout the United States and the world, to have determined the question of whether majority consent to sale of assets can be substituted for unanimous consent by act of the State legislature.

Appellant suggests there is no case determining whether the Delaware statute, 8 Del. C. § 271, can be applied to a

previously organized corporation and its stockholders so as to substitute majority stockholder approval for a sale of its assets when previously, consent of all was necessary for a profitable corporation. In its broadest terms the question means this. Can the State's reserved power to amend be used to circumvent Federal Constitutional limits on its statutory power?

The answer in this day and age can only be in the negative. As stated in 69 Harvard Law Review 538 (1956), at page 540:

> "But even if the charter is a contract between the state and the corporation, a term permitting the state to amend its own contract would not seem to provide it with power over the shareholders' contract. Nevertheless, it might be argued that the reserved power, like all other terms of the corporation laws, becomes part of the charter by force of law, and therefore part of the shareholders' contract inter sese. Thus the shareholders would be deemed to have consented in advance to the exercise by the State of a power to amend the charter or to authorize the majority to do so. Under this theory, which has apparently been adopted by New York Courts, it might be argued that the shareholders have contracted away the customary due process protection against arbitrary state action, so that the courts could declare state statutes invalid on constitutional grounds only in extreme cases if at all. However, it is difficult to find consent to future charter amendments since it is doubtful whether many shareholders are aware of the reserved power. Moreover, even if shareholders are cognizant of the reserved power, it seems harsh to hold that they have given blanket assent to subsequent amendments conforming to any statutory authorization which may be formulated. To limit due process protection on the basis of fictional consent would allow the state to circumvent by statute constitutional limits on its statutory powers. Thus it would seem that any power which the state might have to authorize amendments to the shareholders' contract *inter se* is not expanded by a statutory reservation."

Secondly, the Delaware Supreme Court, by a completely unreasonable construction of its own pre-existing rule, sought, in effect, to apply a special and new rule to this plaintiff, thereby avoiding a decision on her rights, which go to the very heart of the case, and thus denied her an application of the law to which she was entitled.

I

The Old Company was incorporated in Delaware in 1914.

There was in effect at the time, 8 Del. C. § 242, appearing in Appendix C hereof, which authorized changes in the corporate charter but does not specifically mention sale of assets.

The Delaware statute, 8 Del. C. § 271, *supra*, permitting the sale of corporate assets without the consent of all of the stockholders, was enacted in 1917. The statute by its terms is not made retroactive.

A corporate charter is a contract between the state and the corporation, a contract between the corporation and the stockholders, and a contract between the stockholders *inter sese*.

> *Morris* v. *American Public Utilities Co.* (Del. Chan. 1923), 14 Del. Ch. 136, 122 A. 696.

Prior to the enactment of the statute, the common law rule required assent of all stockholders in the sale of the assets of a profitable corporation.

> 13 *Am. Jur. Corporations*, Sec. 428;
> *Geddes* v. *Anaconda*, 254 U. S. 590, 41 Sup. Ct. 209, 65 L. ed. 425 (1921);
> *Allied Chemical & Dye Corporation* v. *Steel & Tube Co. of America* (Del. Chan. 1923), 14 Del. Ch. 1, 120 A. 486, 14 Del Ch. 64, 122 A. 142;
> *Butler* v. *New Keystone Copper Co.* (Del. Chan. 1915), 10 Del. Ch. 371, 93 A. 380.

As announced in *Geddes* v. *Anaconda, supra* the reason for the rule is said to rest upon the principle that the exercise of a power of sale of the assets of a going and prosperous company "* * * would defeat the implied contract among the stockholders to pursue the purpose for which it was chartered."

No subsequent statute may destroy any vested rights which the stockholders may have had as of the date of incorporation, and no statute may authorize a majority of the stockholders to destroy such rights.

> *Allen* v. *Francisco Sugar Co.* (N. J. Ct. Er. & App. 1921), 29 N. J. Eq. 431, 112 A. 887;
> *Keller* v. *Wilson & Co.* (Del. Sup. 1936), 21 Del. Ch. 391, 190 A. 115;
> *Consolidated Film Industries Inc.* v. *Johnson* (Del. Sup. 1937), — Del. Ch. —, 197 A. 489;
> *Wessel* v. *Guantanamo Sugar Co.* (N. J. Ch. 1944), 134 N. J. Eq. 271, 35 A. 2d 215; aff'd per curiam (N. J. Er. & App. 1944), 135 N. J. Eq. 506, 39 A. 2d 431.

In the *Allen* case a statute permitting the lease of corporate assets with consent of the holders of two-thirds of the stock, was enacted after the corporation was organized. The Court held that the plaintiff stockholder could obtain an injunction to prevent such a leasing, and this, even though his stock was acquired after the passage of the statute. The Court's rationale was that the state's reserved power did not extend to a change in the contract of the stockholders *inter sese*.

The leading Delaware case limiting the retroactive application of statutes affecting corporate charters is *Keller* v. *Wilson, supra*. Here, the corporation was not permitted to amend its charter, under a statute to cancel accrued unpaid preferred dividends without the consent of the stockholder, since the stock had been issued at a time when the

law did not permit such cancellation. The right to the dividend was declared by the Court to be "* * * a vested right of property secured against destruction by the Federal and State Constitutions."

The right of a stockholder to continue to be a stockholder and to have a share in the corporate enterprise in which he chose to invest is surely a fundamental right of which a stockholder cannot be deprived without either:

1) statutory authority existing prior to the issuance of the stock, or

2) a statute expressly providing for retroactive application because the "public interest" demands such a deprivation of rights.

Granted the State may reserve power to amend the corporate charter to the extent that a charter still constitutes a contract between the State and the corporation, but this power can not, short of repeal Article I, Section 10, of the U. S. Constitution, forbidding impairment of contracts, be extended to give the State a control over contracts between the stockholders.

> *The Limitations of the Power of a State under the Reserved Right to Amend or Repeal Charters of Incorporation*, XLIV American Law Register 1, 73, 142 (1905), by Horace Stern (later Chief Justice of Pennsylvania).

The State could not require an existing unincorporated association whose by-laws limit the sale of assets to sell these assets merely because a majority of its members voted to do so. It cannot by mere reservation of a right to amend a charter force such changes on existing corporations since the stockholders have already agreed to these matters. At the time of incorporation the stockholders, accepting the then existing law, did not therefore provide in the charter for 100% consent, knowing that the reserved right to change the law did not carry with it the

right to destroy existing agreement to which the State was not a party. As Horace Stern suggests (op. cit. at p. 93) nothing short of a repeal of Article I, Section 10 of the United States Constitution can give to the State control over the charters in so far as these represent contracts between the stockholders.

II

The appellant raised on appeal before the Supreme Court of Delaware, for the first time in the case, the question as to the constitutionality of 8 Del. C. § 271 as applied to her. The Court refused to consider the question.

The Delaware Supreme Court by a completely unreasonable construction of its pre-existing rule has sought to avoid a decision on this substantial minority rights question.

The rule previously announced by the Supreme Court of Delaware was, that it acting as an appellate court would not consider questions which had not been fairly presented to the trial court below. However, this rule was subject to two exceptions: 1) when the question is one of jurisdiction of the subject matter, and 2) when a question of public policy is involved.

Richards v. *State* (Del. Supreme Ct. 1950), 6 *Terry* 573, 77 A. 2d 199.

In *Richards* v. *State, supra,* the Supreme Court of Delaware allowed a question of the application of constitutional guarantees to be raised *de novo* on appeal under the public policy exception. The defendant at no time during the trial below, which resulted in a conviction of driving an automobile while under the influence of intoxicating liquor, made a clear objection that certain testimony was

inadmissible under constitutional guarantees against illegal search and seizure and self-incrimination. On appeal to the Delaware Supreme Court the defendant raised, among others, the question "Should a man be deprived of his liberty unlawfully, compelled to perform acts, and the evidence thus obtained used as the sole basis to convict him?"

The Court held, through Justice Wolcott, that "* * * we further think the question presented to us was not fairly presented below, nor were the usual exceptions made to preserve the defendant's right to raise the question by Writ of Error" (77 A. 2d 202). The Court went on to say, however, "Since the defendant seeks to raise here a question of the application of certain constitutional guarantees which has never been passed on by this Court, we are constrained to permit him to do so under the public policy exception to the rule, even though the objection was made below at best by implication" (77 A. 2d 199).

The rule existing then, when plaintiff raised this question for the first time on appeal, was, in short, that ordinarily she could not do so, but if there were a question of constitutional guarantees involved she could do so as a matter of public policy.

Richards v. *State*, *supra*.

The Supreme Court declined to consider her contention, citing the general rule that questions not fairly raised in Court below will not be considered on appeal (128 A. 2d 233). It denied her the aid of *Richards* v. *State* by saying, through Chief Justice Southerland,

> "That case is of no help to the plaintiff here. It concerned a case of illegal search and seizure in a criminal case, and the constitutional question, though not raised by a direct objection to the evidence was sufficiently brought to the attention of the trial judge." (128 A. 2d 233.)

The plaintiff subsequently reminded the Court in her Petition for Reargument that the *Richards* case was based on the broad ground of constitutional guarantees, and that the Court there held that the question was not fairly presented below, the Court there allowing it, " * * * even though the objection was made below at best by implication" (77 A. 2d 199). The Court denied her Petition.

As this was a point of law, not at all dependent on facts that might have been presented below had the point there been raised, and both parties have briefed the point, there is no compelling reason why constitutionality could not have been considered although not raised below.

4 C. J. S. Appeal and Error, Sec. 240, p. 462;
12 C. J. Const. Law, Sec. 217 (3) p. 786;
Fourth Nat. Bank v. *Francklyn*, 120 U. S. 747, 751, 7 S. Ct. 757, 759, 30 L. Ed. 825, 827;
Stierle v. *Rohmeyer*, 218 Wis. 149, 260 N. W. 647 (Sup. Wis. 1935);
Cappon v. *O'Day*, —— Wis. ——, 162 N. W. 655 (Sup. Wis. 1917);
Shaffer Oil & Refining Co. v. *County Treasurer*, —— Okl. ——, 52 P. 2d, 78 (Sup. Okl. 1935);
McCabe v. *Maysville, etc. R. Co.*, 136 Ky. 674, 124 Ky. 892 (Ct. Appeal, Ky. 1910);
Shaw v. *Woodruff*, —— Tenn. ——, 35 S. W. 2d, 167 (Sup. Tenn. 1928);
Kansas City Power & Light Co. v. *Town of Carrollton*, 346 Mo. 802, 142 S. W. 2d, 849 (Sup. Miss. 1940);
Matthew v. *Bailey*, 198 Ark. 830, 131 S. W. 2d; 425 (Sup. Ark. 1939);
Galli v. *Brown*, 110 C. A. 2d 764, 243 P. 2d, 920 (Dist. Ct. Appeals Cal. 1952);
People v. *Railway Mail Mut. Benefit Ass'n.* 371 Ill. 102, 20 N. E. 2d, 91 (Sup. Ill. 1939).

What is the meaning of this action?

1. The Supreme Court of Delaware has deprived plaintiff of the due process of law under the 14th Amendment of the United States Constitution by seeking to avoid a decision on the unconstitutionality of 8 Del. C. § 27 through a completely unreasonable construction of its own existing rule, resulting in the application of a special rule to her case in conflict with its own pre-existing rule.

2. The Supreme Court of Delaware has denied the plaintiff equal protection of the laws as guaranteed by the 14th Amendment of the United States Constitution by applying a previously non-existent rule in conflict with its own previously announced rule.

Certainly, in view of the avoidance of the Federal right by the Supreme Court of Delaware, this Court should take jurisdiction of this case, for in the words of Mr. Justice Frankfurter in *Williams* v. *Georgia*, 349 U. S. 375, 75 S. Ct. 814, 99 L. Ed. 1161 (1955) at page 819,

> "But where a State allows questions of this sort to be raised at a late stage and be determined by its courts as a matter of discretion, we are not concluded from assuming jurisdiction and deciding whether the state court action in the particular circumstances is, in effect, an avoidance of the federal right."

CONCLUSION

It is submitted that the decision of the Supreme Court of Delaware is an unwarranted attempt to avoid the application of the guarantees of the United States Constitution and that the questions presented by this appeal are substantial and of public importance.

Respectfully submitted

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APPENDIX A

Opinion of Supreme Court of the State of Delaware

IN THE

SUPREME COURT OF THE STATE OF DELAWARE

No. 14, 1956

HELEN E. COTTRELL,

Plaintiff Below, Appellant,

v.

THE PAWCATUCK COMPANY (formerly the C. B. Cottrell & Sons Company), a Delaware Corporation (known as the Old Company); HARRIS-SEYBOLD COMPANY, a Delaware Corporation, DONALD C. COTTRELL, RIDLEY WATTS, ARTHUR M. COTTRELL, JR., CHARLES P. COTTRELL, JR., and THE COTTRELL COMPANY, a Delaware Corporation (known as the New Company),

Defendants Below, Appellees.

(December 21, 1956)

SOUTHERLAND, C. J., and WOLCOTT and BRAMHALL, J.J., sitting.

Appeal from a judgment of the Court of Chancery of New Castle County dismissing after final hearing a stockholder's complaint attacking the validity of a sale of corporate assets. Affirmed.

Douglas W. Troll and Andrew D. Christie, both of Wilmington, for appellant, and Helen E. Cottrell, pro se.

Appendix A

Henry M. Canby, of Richards, Layton & Finger, of Wilmington, for appellees The Pawcatuck Company, Donald C. Cottrell, Ridley Watts, Arthur M. Cottrell and Charles P. Cottrell, Jr.; Richard F. Corroon, of Berl, Potter & Anderson, of Wilmington, and Paul J. Bickel, of Squire, Sanders & Dempsey, of Cleveland, for appellees Harris-Seybold Company and The Cottrell Company.

SOUTHERLAND, C. J.:

The essential question is whether the consideration received upon a sale of corporate assets was grossly inadequate.

Plaintiff, a substantial stockholder of the defendant, The Pawcatuck Company, formerly the C. B. Cottrell & Sons Company (herein referred to as "the old company"), sued to enjoin a sale of assets on the ground that the price was grossly inadequate.

An outline of the basic facts follows. It will be supplemented by additional facts in the discussion of plaintiff's contentions.

The selling corporation is the old company, an old closely-held family enterprise, founded in 1855. It was engaged in the manufacture and sale of printing presses and accessories. It had two plants, one in Connecticut and one in Wisconsin. At the time with which we are principally concerned it was a Delaware corporation with $256,000 of preferred stock and 8,000 shares of common stock issued and outstanding. The common shareholders were all descendants of the original founder or connections of the descendants.

For some years before 1950 Charles P. Cottrell, Jr. was president and held a majority of the common stock—4502 shares. In 1949 he retired from the presidency because of ill health, and Donald C. Cottrell was elected president. Two new directors, non-stockholders, were added to the

board. In the following year Charles sold 4002 shares to Donald at $100 a share—"the family price". Donald retained 2002 shares and resold 2000 shares to members of his family at $100 a share. These shareholders, holding 4002 shares, together with Charles P. Cottrell, Jr., holding 500 shares, constitute the "majority group". Of the nine directors of the corporation in 1953 they had seven. The remaining 3,498 shares were held by other members of the Cottrell family, including Helen E. Cottrell, the plaintiff. These shareholders constitute the "minority group". They had two members of the board, Helen and Leone B. Birdsall, her sister.

Differences of view over corporate policy divided the two groups of stockholders. In 1949 Donald's election as president was strongly opposed by the minority, or at least by Helen, who appears to have been the articulate spokesman for her group. During the following years the minutes reflect frequent objections and criticisms voiced by Helen related to the actions of the majority.

As early as 1947, Donald Cottrell, then in charge of the plant in Wisconsin, had explored the possibility of selling or merging the old company. He had discussed the matter with Harris-Seybold Company (one of the defendants). Nothing came of the discussions because of opposition of the minority. After he became president, Donald had approached officials of five or six companies, again with the thought of a sale or merger. Nothing came of these inquiries.

In June, 1953, he received a call from the chairman of the board of Harris-Seybold, inquiring whether he (Donald) cared to resume negotiations. Donald was interested. Negotiations followed. They culminated in a contract dated November 9, 1953, providing for the sale of corporate assets to Harris-Seybold subject to director

and stockholder approval, as required by the statute. 8 Del. C. § 271.

The necessary approval was had. Thereafter Helen Cottrell sued in the court below to enjoin the sale as a waste of corporate assets. Injunctive relief was denied, and the sale was consummated. Thereafter the case came on for trial on the merits. The plaintiff sought rescission, or, alternatively, damages. The Chancellor sustained the action of the majority directors and stockholders, holding the consideration for the sale adequate. See 116 A. 2d 787. Plaintiff appeals.

Plaintiff attacks the validity of the sale on several grounds. These will be considered seriatim.

1. *The majority directors had a peculiar and personal interest in the sale which overcomes the presumption of good faith ordinarily attaching to the actions of directors.*

At the time of the sale the seven so-called majority directors and their individual holdings of stock were as follows:

Name	*Shares held*
Donald C. Cottrell	2,002
Charles P. Cottrell, Jr.	500
Arthur M. Cottrell, Jr.	500
Ridley Watts	300
Karl C. Stillman	None
H. Glover	None
Barclay Robinson	None

In addition Mrs. Donald C. Cottrell held 1,000 shares, and Mrs. Watts 200.

The argument is that the Cottrell majority directors had acquired their stock at $100 a share; that the proposed sale of assets would yield them a 300% net profit after taxes; and that the prospect of this profit, and the

likelihood that Donald, "the dominant majority factor", would continue to be employed at the same salary, gave them a personal and selfish interest that robs their action of the presumption of good faith.

The record clearly disproves this contention. The reasons that prompted Donald Cottrell to negotiate a sale and recommend it to his fellow directors and stockholders were these:

He believed that the day of the small family-held corporation was practically over, and that such a company must expand, or join forces with a strong company, or run the risk of being swallowed up by competition. Upon his death a serious problem of liquidating his holdings to pay estate taxes would immediately arise; and as a consequence there would arise a problem of continuity of management. Control might pass to the minority group—a result that he clearly believed would be harmful to the corporation. We gather that the other majority directors concurred in this view.

Whether his judgment upon these matters was sound is not for us to say. Certainly there was some basis for it. It is enough to say that there is nothing to suggest bad faith or an intention to deal unfairly with the minority. All of the matters mentione were proper to be considered. And this includes the matter of the consequences of the levy of estate taxes, which would create a similar problem for the estate of any stockholder, though a less serious one. In his case the liquidation of his stock might entail the serious consequences of a shift of control.

As for the prospect of continued employment, it is clear that there was no agreement to continue Donald Cottrell in the new company at his former salary. True, the purchaser expected and desired that for a period of time the organization should remain intact. This is natural, and is no badge of fraud. The Chancellor so held, and we agree.

Moreover, the argument has no application to two of the non-stockholder directors, Robinson and Glover. Neither had any motive other than to exercise their best judgment in the interest of the corporation.

Plaintiff cites *Allied Chemical & Dye Corporation* v. *Steel & Tube Company*, 14 Del. Ch. 1, 120 A. 486, in support of her argument. In that case the Chancellor held that the prospect of a profit to the controlling stockholders did not disclose such a peculiar and personal interest as amounted to fraud, but also held that in the circumstances there presented the interested stockholders might view the question of the adequacy of price "not so much from the angle of stockholders interested primarily in securing the best permissible prices for assets, but from the angle of purchasers of stock interested primarily in securing a fair profit on a speculation": 14 Del. Ch. 24. In that case a syndicate had purchased the controlling common stock from the estate of the deceased owner for the express purpose of making a profit upon it, by sale or otherwise.

No such situation is here presented. Obviously, Donald Cottrell was given the opportunity to acquire the majority of stock for the purpose of ensuring control of the management of the business. It is no case of an outsider buying into a corporation to make a speculation.

We hold that the acts of the directors in this case are clothed with the presumption of good faith and honest business judgment.

2. There was no real legal approval of the sale by the directors acting as a board; to all intents and purposes, the sale was approved and ordered by a "majority caucus."

This contention is not based upon a claim that there was no approval at a directors' meeting regularly called and held. There was such a meeting held November 19,

1953, attended by seven directors, at which five voted for the sale and two (the "minority directors") against it. The contention is that the minority directors were given no opportunity to participate in the negotiations leading up to the signing of the contract and no sufficient information to enable them to vote on it intelligently. It is further said that Donald, "motivated by a desire to unload his stock at a fraction of its value", first agreed to a sale "at so much per share" and when that plan failed another plan was "hurriedly devised" and "hastily adopted". Hence it is said that the statute requiring directorate action for a sale of corporate assets was, in effect, disregarded.

The record disproves this contention. It shows the following:

Actual negotiations with Harris-Seybold started in September. During June Donald had talked with Helen and told her that a matter of interest had come up. She asked if it was Harris-Seybold and he said it was. He agreed to send her and her sister the most recent figures on Harris-Seybold. That he did. During the summer he tried several times unsuccessfully to arrange a meeting with them, and finally met with them early in September. He told them Harris-Seybold was interested. They asked him what price could be had for the stock, and Donald said he thought between $250 and $500 a share. On October 24th Donald telephoned Helen and told her he had a draft contract presented by Harris-Seybold and wanted to arrange a meeting. A meeting was had on October 27th at the office of Helen's counsel in New York City. There were present Helen and her mother and sister, Messrs. Gallagher and Walton, their counsel, and Donald Cottrell and the corporation's counsel, Mr. Frank Chapman. The contract was reviewed and discussed, as well as an opinion reflecting the tax aspects of the pro-

posal sale. On October 30th there was a meeting attended by Helen, her mother, Dr. Birdsall, Mrs. Edgar Cottrell, Messrs. Gallagher and Walton, Mr. Chapman and Mr. Glover, one of the directors of the old company. The provisions of the proposed sale were discussed, and Glover gave his reasons for thinking it advisable. Helen asked for certain information, and Glover sent her what was available to him. Between October 30th and the date of the directors' meeting Chapman had three conferences and three telephone talks with representatives of the minority stockholders. His object was to keep them informed of everything that was going on.

The contention that the minority directors were kept in the dark about the matter appears to be completely unfounded. So far as concerns the conduct of the negotiations, it appears that the president and his counsel took the lead, as was natural and proper. The contention that the plan was hastily devised and hastily adopted is likewise disproved by the record. The original idea of selling the stock was abandoned because the directors believed that it was impossible to persuade the minority group to sell their shares. A plan for the sale of the assets was then worked out. It is unnecessary to review the testimony in detail. It shows that the negotiations proceeded in an orderly manner, without undue haste, and resulted in an arm's-length bargain struck between a willing seller and a willing buyer.

We are of opinion that the directorate action complied with the statutory requirements.

3. The adequacy of the price.

The sale was based upon the old company's balance sheet of July 30, 1953.

The old company's books showed gross assets of $8,691,451.46 and liabilities of $2,451,972.56, or a net worth of $6,239,478.90—a book value of about $780 a share. Cer-

tain assets were sold to Harris-Seybold and certain assets were retained by the old company. The book value of the assets sold was (in condensed form) as follows:

Accounts & notes receivable prepaid items & miscellaneous	$1,430,851.87
Patents	52,828.89
Inventories	3,405,630.57
Plant and Equipment	1,989,282.60
	$6,878,593.93

The retained assets were cash, government securities, and the cash value of life insurance. These totaled $1,812,857.53, subject to liabilities not assumed by the purchase of $1,397,975.23, or net retained assets of $414,882.30.

The purchase price was $3,553,997.33, divided as follows (again in condensed form):

Accounts & notes receivable prepaid items & miscellaneous	$1,430,851.87
Patents	1.00
Inventories and plant & equipment	2,123,144.46
	$3,553,997.33

This price was subject to increase or decrease, to reflect changes in the current assets and inventory of the old company. These adjustments reduced the actual amount paid to about $3,116,000, but we think that in determining the adequacy of the price, the contract figure must be adopted. The adjustment provision was "a two-way street".

Of the total purchase price $1,057,997.33 was payable by the assumption by Harris-Seybold of liabilities of the old company in that amount, representing advance deposits against inventory in process of manufacture. The balance was payable in cash, or in Harris-Seybold stock to the extent of not exceeding $500,000. Since the sale looked to liquidation, and since the old company retained net assets

of over $400,000, the total return to the stockholders was about $4,000,000. (This does not include the refund of federal income taxes—a matter later considered.)

It is plain from the above figures that the disparity between net book value and the purchase price lies in the price paid for inventories and plant and equipment—probably largely in plant and equipment. (The evidence indicates that the value of the patents was negligible.) The disparity is substantial, the price being about 40% of book value—$2,223,000 to $5,393,000 in round figures.

But this sale, although in the form of the sale of certain specified assets, was a sale of operating assets, less cash, and hence in effect a sale of a going business *without working capital*. We are to determine whether the evidence shows such a gross inadequacy of the price received for the sale of that business as to raise an inference of improper motive or reckless indifference to the interest of the minority stockholders.

It has been repeatedly held in this State that upon a sale of corporate assets of an industrial corporation, the book value is of far less importance than earning power, and that reproduction cost less depreciation and valuations for insurance purposes are of little help in determining market value of plant and equipment. See *Baron* v. *Pressed Metals of America*, ... Del. Ch. ...., 123 A. 2d 848, and cases cited. These principles are applicable here. There was produced in this case, as in the *Pressed Metals* case, an insurance valuation. It totalled $13,000,000 on physical properties. The plaintiff also produced an engineer's appraisal of plant and equipment of $6,094,000 on the basis of reproduction cost new less depreciation. A consideration of the evidence touching going concern value based on earnings will disclose that little weight can be attached to these appraisals in determining whether the price received was grossly inadequate.

Appendix A

We take up first the opinions of the directors themselves.

Donald Cottrell, the president, had been with the company twenty-four years. For the reasons heretofore set forth, he was of opinion that a sale of the old company was desirable. He was of the opinion that the value of the company was about $4,000,000, or $500 a share. (Presumably he had in mind the common stock.) In early June 1953, he discussed the matter with two of the other directors, Messrs. Glover and Robinson. Mr. Glover, a director for four years, was senior vice president of the Hartford National Bank and Trust Company. He had had twenty-two years of experience in analyzing balance sheets and evaluating the worth of corporate enterprises. He had had a wide business experience, and was a director of several manufacturing corporations. He had a study made by one of his juniors of the net worth of the old company. This study was based on a method of capitalizing average yearly earnings for a five-year period, amounting to $326,400. Three computations were made, resulting in valuations of $2,285,000, $4,083,000, and $3,852,000. Glover thought the first figure too low because of the company's substantial book value and asset position. The second computation gave $4,083,000. But Glover believed that because of the nature of the plant and the nature of the business the book value was overstated. Using still a third factor, and capitalizing earnings at seven times, he arrived at $3,852,000. Upon the basis of his study he concluded that if the 8,000 shares of common stock could be sold for $4,000,000, it would be an excellent sale. These figures he made available to Donald and to Barclay Robinson.

Robinson, a director for four years, had been a member of the law firm that represented the company. He was in 1953 a vice president of the Hartford National Bank and Trust Company, and was a director of two other manu-

facturing corporations. In a discussion with Donald Cottrell upon the matter of a possible sale, Donald mentioned a price of $500 a share, which Robinson thought might well be satisfactory to the minority.

Mr. Charles P. Cottrell, Jr. had been with the old company during most of his career, and had served as president for fourteen years. After hearing the proposed sale to Harris-Seybold explained, he was willing to sell at the price suggested.

Mr. Arthur M. Cottrell, Jr. had been with the old company twenty-two years, including nineteen years as secretary. After receiving the information about the proposed sale he consulted with a Mr. O'Brien, a lawyer, who was a connection of his and general counsel for Cities Service Company, and gave O'Brien financial data concerning the company. O'Brien advised Arthur that "it [the proposed sale] was a good thing to do not only for the company but for the stockholders."

Ridley P. Watts, a director for two years, was executive vice-president of a textile corporation. In connection with the proposed sale he got some figures relating to companies in the textile business, which he considered comparable to the graphic arts industry. He arrived at a value of $4,500,000, and thought the price offered very attractive. He thought the sale desirable, because he believed that if anything happened to Donald there was no one qualified to take over.

We have detailed at length the opinions of the directors because we think that their judgment is entitled to great weight. The attempt to impeach the motive of the stockholder directors has already been considered and has been rejected. It was obviously to their interest to get the best price obtainable. And the non-stockholder directors had no such personal interest in the sale as would impeach their judgment. Mr. Glover's analysis is particularly important.

because he took into account the book value and asset position of the company.

When we turn to the testimony of the experts upon the issue of value we find that they are all apparently in agreement that some form of capitalizing earnings is the most appropriate method of evaluating the worth of the old company. But they are in marked disagreement both in computing net earnings and in selecting the basis of capitalization.

Plaintiff's principal expert was a representative of a well-known firm of engineers who was retained by the plaintiff to make an appraisal and evaluation of the old company's assets. The appraisal included a valuation based on net earnings before taxes. A chart of such earnings was submitted. It shows violent fluctuations from 1944 to 1953. Net earnings after taxes, of course, reflect these fluctuations. The matter is further complicated by the fact that during the years 1951 and 1952 the earnings included profit derived from the manufacture of rocket motors for the Navy—a temporary thing.

Plaintiff's expert was of opinion that as of November 30, 1953, the immediate outlook was decidedly favorable. By a process of converting a sharply zigzagging line into a smooth curve, representing net income before taxes, he forecast rising income, leveling off about 1956-1957 at $1,175,000 per annum before taxes. This "estimated future average" he adopted as a basic factor in his evaluation. The new company had a good year in 1954, and this circumstance he used to buttress his forecast—a method smacking somewhat of hindsight. Deducting probable income taxes, he arrived at probable average future net earnings after taxes of $564,000. By capitalizing earnings at 11% and also using the so-called "Hoskold method" he arrived at a figure of $6,150,000 as representing the value of the old company's earning ability exclusive of rockets.

This works out to about eleven times earnings. To that figure he added the $300,000 as net earnings of the rocket business for two years. Subtracting from the total of $6,450,000 estimated working capital of $800,000, he arrived at a figure of $5,650,000 as the value of the assets sold.

Upon this analysis two comments may be made. First, it takes no account of the possible future difficulties in management that might well affect future earnings. Second, and more important, it is admittedly based, not directly upon past demonstrated earning capacity, but upon an opinion of future favorable development and increased earnings.

Defendants' expert used actual earnings in his computations. By using various earning periods and combining them with returns of 12% and 15% (18½ to 6⅔ times earnings), he arrived at values approximately of $4,200,000, $3,622,000, $3,357,000 and $2,231,000.

The analyses of the two experts show, of course, that the result achieved depends first upon the earnings figure selected and second upon the rate of capitalization. The Chancellor, assuming without deciding that the plaintiff's earnings figure of $564,000 was correct, applied a multiplier of seven or eight times earnings.

As between the valuation based on a forecast of the future and one based on actual figures, the latter method seems preferable. We fully recognize the truth of Justice Holmes' dictum cited by plaintiff's expert that "the commercial value of property consists in the expectation of income from it."[1] But estimates of future income must necessarily depend to a great extent on past performance. In this case the past violent fluctuations of net earnings suggest a more conservative approach than that adopted by plaintiff's expert.

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[1] *Galveston etc. Ry. Co. v. Texas*, 210 U. S. 217, 28 S. Ct. 638

Such an approach was obviously adopted by the directors. Mr. Glover's analysis of the value of the business, set forth above, is based upon actual earnings capitalized, combined with an allowance for book value and asset position. If his figure of $4,100,000 be accepted, and if something is added for the "rocket business" (the Chancellor added $75,000), it is manifest that the price was adequate, since from the total there must be subtracted at least $800,000, representing working capital, to arrive at the value of the assets sold.

There is, of course, room for difference of opinion whether the value so arrived at is correct. A greater valuation might be justified. But we do not think that any reasonable increase of this figure could justify a finding that the price was grossly inadequate. Plaintiff's case rests upon two premises that are questionable—a forecast of the future and (in effect) a capitalization rate of eleven times the earnings so forecast. As the Chancellor pointed out, the old company's business was of the kind described by Professor Dewing as having a value of eight to seven times normal earnings. The author refers to "the old 'family' machine tool factories" as a special example of that kind. Dewing, *Financial Policy of Corporations* (5th Ed.), Vol. I, pp. 388-389.

It is also to be noted that Harris-Seybold's earning analysis of the value of the old company adopted an even lower capitalization rate—six times earnings.

One other factor is important. If plaintiff's valuations are accepted, the majority stockholders have inflicted upon themselves a serious capital loss. Why should they do that? As the Chancellor noted, the possible additional benefits to them from the sale could not compensate them for that loss.

From the foregoing discussion a finding that the price was not grossly inadequate is indicated. Some subsidiary arguments of plaintiff must, however, be noticed.

Appendix A

Plaintiff makes some point of another computation of value made by a certified public accountant. It shows a fair value of $6,200,000 and an "average value for intangibles" of $673,000. This computation adds nothing of value to the analysis of the engineers.

Plaintiff stresses the liquidation value of $5,910,000 arrived at by the engineers. In view of the importance of earning value and because of certain other doubtful assumptions made in arriving at this figure, noticed by the Chancellor, we cannot give it much weight. Certainly, it is an insufficient basis upon which to base a finding of gross inadequacy of price.

Plaintiff bottoms an argument upon the matter of the income tax refund. Because the fixed assets were sold at a loss, the old company was entitled to a refund of 1952 federal income taxes amounting to about $1,141,000. This refund it obtained. It also was relieved of an estimated tax liability for 1953 of $830,000. Plaintiff says that the transaction was deliberately designed by buyer and seller to create a fictitious loss; that in the course of the negotiations the defendants, having determined upon a price they expected to get from the buyer, restated the value downward for the purpose of getting the tax refund. This argument is highly unreasonable. Since the tax is less than 100%, the seller could have no motive to give up a dollar to recover fifty-two cents (assuming 52% as the tax rate). We find no evidence that the tax refund was the concern of the buyer in connection with the negotiations. The president of Harris-Seybold expressly denied that the buyer was concerned with it. It figures in computations made in connection with the sale, and the directors took it into account in determining the wisdom of the sale. Why should they not do so?

Defendants insist that even if the price was grossly inadequate the overall return to the stockholder was not so, because of the tax refund. They argue that, assuming that the tax refund does not constitute a consideration

moving from the purchaser, it was nevertheless a term or condition of the sale justifying the directors in selling the assets at the price fixed. The argument has some force, since the refund will substantially enhance the return to the stockholders on liquidation; but in the view we take of the case, it is unnecessary to pass upon it.

Finally, plaintiff argues that the Chancellor failed to take into account, in arriving at a valuation of the assets sold, the old company's liabilities. This argument we are unable to follow.

It is our conclusion that in fixing the price for the assets sold the directors acted within the reasonable limits of business judgment. The plaintiff has failed to show any such gross inadequacy of price as would justify an inference of reckless disregard of the rights of the minority stockholders.

There remains for consideration a contention made for the first time in this Court, that the Delaware statute authorizing the sale of substantially all the assets of a corporation by vote of the majority of the voting shares is unconstitutional if applied to the old company, because its charter antedates the statute.

This question we decline to consider. It has been many times ruled in this State that questions not fairly raised in the court below will not be considered on appeal. See, for example, *Stephenson v. Commonwealth & Southern Co.*, 19 Del. Ch. 447, 168 A. 211.

Plaintiff cites *Rickards v. State*, 45 Del. 573, 77 A. 2d 199, in which two exceptions to the general rule were noted. That case is of no help to the plaintiff here. It concerned a case of illegal search and seizure in a criminal case, and the constitutional question, though not raised by a direct objection to the evidence, was sufficiently brought to the attention of the trial judge.

Plaintiffs' attempt to raise the constitutional question here comes too late.

The judgment of the Court of Chancery is affirmed.

Appendix A

Mandate

THE SUPREME COURT OF THE STATE OF DELAWARE

To the Honorable the Chancellor of the State of Delaware in and for New Castle County:

GREETING:

WHEREAS, before you or some of you in a cause entitled as follows:

(Civil Action 465)

HELEN E. COTTRELL,

Plaintiff,

v.

C. B. COTTRELL & SONS COMPANY, *et al.*,

Defendants,

a certain judgment or order was entered on the fourth day of October 1955, to which reference is hereby made; and

WHEREAS, by appropriate proceedings the said cause was duly appealed to this Court, and after hearing has been finally determined, as appears from the opinion of this Court filed in the cause on December 21, 1956, a certified copy of which is attached hereto;

ON CONSIDERATION WHEREOF IT IS ORDERED AND ADJUDGED that the said judgment or order be and it is hereby affirmed, with costs, hereby taxed in the sum of Three Thousand Five Hundred Thirty Three—Dollars ($3533.00) to be recovered by C. B. Cottrell & Sons Company against Helen E. Cottrell, with right of execution.

WITNESS The Honorable Clarence A. Southerland, our Chief Justice at Dover, the 1st day of January, A. D. 1957.

T. E. TOWNSEND, JR.,
Clerk of the Supreme Court.

Issued January 24, 1957.

Appendix A

Opinion of Chancellor Seitz After Trial

(Filed September 28, 1955)

Arthur G. Logan and Aubrey B. Lank of Logan, Marvel, Boggs and Theisen of Wilmington and A. A. Berle, Jr., Rudolph P. Berle and Robert H. Seabolt of Berle, Berle, Agee & Land of New York City for plaintiff.

Henry M. Canby and Louis J. Finger of Richards, Layton and Finger of Wilmington for defendants, The Pawcatuck Company, Donald C. Cottrell, Ridley Watts, Arthur M. Cottrell, Jr., and Charles P. Cottrell, Jr.

Richard F. Corroon of Berl, Potter and Anderson of Wilmington and Paul J. Bickel and Elmer Jacobs of Cleveland, Ohio for defendant Harris-Seybold Company.

SEITZ, Chancellor: Plaintiff brought this action as aa stockholder of what was then the C. B. Cottrell and Sons Company [1] ("old company") to enjoin a sale of its "non-liquid" assets to the other corporate defendant, Harris-Seybold Company ("Harris"). Actually the assets were sold to what is now a wholly owned subsidiary of Harris, here designated as the "new company".

For reasons set forth in the Court's opinion, plaintiff did not obtain a restraining order or preliminary injunction preventing the consummation of the sale. See *Cottrell v. Pawcatuck*, — Del. Ch. —, 106 A. (2) 709.

Subsequent to the consummation of the sale this case was tried and this is the decision after final hearing. Plaintiff still seeks rescission of the contract and restoration of the status quo. She seeks, alternatively, damages against all the individual defendants, (directors of the old com-

[1] Later its name was changed to The Pawcatuck Company.

pany) against Harris and against the new company. Plaintiff claims that the purchase price specified in the agreement of November 9, 1953, was grossly inadequate and that the agreement was executed by the old company acting through its majority directors and majority stockholders in reckless disregard of and deliberate indifference to the rights of the minority stockholders. Defendants deny the charges.

Preliminarily, I conclude that plaintiff has the burden of proof and while the directors and majority stockholders owed a fiduciary duty to the plaintiff nothing appears which would divest their actions of the presumption of good faith. The stock ownership of the directors and the possibility that some of them would continue with the new company do not destroy this presumption. This has been repeatedly held in Delaware. *Bennett* v. *Breuil Petro. Corp.*, — Del. Ch. —, 99 A. (2) 236.

Plaintiff first claims that there was no valid director approval of the agreement of sale as required by the Statute, 8 Del. C. §271. Plaintiff says some of the directors lacked knowledge of values and proceeded to vote approval though uninformed. Time does not permit an analysis of the situation. But I conclude that the action taken at the directors' meeting of November 12, 1953 to authorize the sale of assets did not violate the Delaware Statute (8 Del. C. §271). See *Allied Chemical & Dye* v. *Steel & Tube*, 14 Del. Ch. 64, 122 A. 142. It is true that not all the directors were fully conversant with all the value factors involved. But that does not mean the approval is invalid. See *Schiff* v. *RKO*, — Del. Ch. —, 104 A. (2) 268 at 279. To the extent lack of knowledge is material, I think it more appropriate to consider it in connection with the question of the alleged fraud in the fixing of the purchase price.

Appendix A

It appears that the majority stockholders of this essentially "family" corporation decided to sell the stock but when it appeared that not all the stock could be sold the "deal" was converted into a sale of assets. Essentially the "selling" majority group of stockholders were interested in receiving a sum which would give them $500 per share for their stock but this does not mean that the aggregate figure was unrelated to their opinion as to the reasonable value of the assets sold.

This is a typical case where each side emphasizes certain value factors and minimizes others, leaving the Court the task of sorting out these various factors and thereafter according them appropriate weight. The imponderables and pitfalls inherent in this process are noted in *Bonbright, Valuation of Property*, p. 251, et seq.

The agreed purchase price for the assets purchased amounted to $3,553.997 subject to certain inventory adjustments which ultimately reduced the price to $3,194,-448. The purchaser paid the old company by cash, by certain of its shares of stock, and by the assumption of its liabilities. The old company retained assets worth about $2,500,000.

Plaintiff claims that the going concern value of the assets sold, which in reality constituted the business and inventory, amounted to at least $5,650,000. Defendants contend that the going concern value was not in excess of $4,000,000 and probably less.

I have no doubt that here the going concern value is vastly more important than book value. Compare *Allied Chem.* v. *Steel & Tube Co.*: *above*. The disparity in the going concern value between that suggested by plaintiff and that urged by defendants is so great that not even in a "valuation" case can both be reasonable.

Appendix A

Plaintiff's expert stated that the going concern value of the assets sold came to $5,650,000. The general basis for his figures are shown by the following figures taken from plaintiff's brief:

Earning Value	$6,150,000
Rockets Value	300,000
	($6,450,000)
Less: Adequate Cash for Working Capital purposes and therefore required to be advanced by the Purchaser in order for the business to function	800,000
Going Concern Value of the assets sold	$5,650,000

Since "earnings value" is the substantial item involved in the chart let us see how this figure was reached. The testimony was that this emerged from the following process:

1. A three year moving average[2] from 1946 to 1953 was compiled, using the figures for the annual net income before income taxes.
2. The average was charted, and on the basis of the expert's evaluation of future prospects the curve was levelled off at $1,175,000 per annum exclusive of profits from rocket operations (hereafter discussed).

[2] The amount shown for each year is the annual average for that year and the two previous years. It was used, according to plaintiff's witness, to smooth out yearly variations, if they occur.

3. The projected annual net profits figure of $1,750,000 was reduced by estimated annual taxes of $611,000 leaving an estimated net annual income after taxes of $564,000, once again, exclusive of rocket profits.

4. The expert then applied several methods and various rates of capitalization to this figure and presumably came up with the earnings figure of $6,150,000 to which was added $300,000 for rockets and from which was deducted an item of $800,000 representing, says plaintiff, the additional working capital required to be advanced by the purchaser. The resultant figure is $5,650,000 which plaintiff says is the minimum going concern value of the assets sold.

In her brief plaintiff has treated the $300,000 rockets' profit as an unrestricted plus in arriving at going concern value. This is contrary to the report of plaintiff's own expert. The report of plaintiff's expert indicates that the rocket profits are to be considered for two years only and the estimated figure is before taxes.

I pass by the foregoing infirmities in plaintiff's approach and consider the reasonableness of plaintiff's going concern value figure of $6,150,000. Necessarily implicit in the earnings value used by plaintiff's expert is a capitalization rate of about eleven times the estimated net annual income after taxes of $564,000. Plaintiff contends this is a reasonable capitalization rate.

Defendants claim that seven or eight times such earnings would be the highest justified for this corporation. Eight times would amount to $4,512,000. If we add some reasonable figure for rockets' profits (I take $75,000) we arrive at a figure of $4,587,000. From this we deduct the $800,000 which plaintiff admits the purchasing corporation had to advance (since it took the business without its cash) and we come to a going concern value for the assets sold of

$3,787,000 for which the purchaser paid $3,194,448. This disparity is substantial but if we adopt a capitalization figure of seven we arrive at a figure approximating the amount actually received for the assets sold.

Thus, assuming without deciding that plaintiff's estimate of future net earnings before rocket profits is sound, it is apparent that a vital issue for determination is whether plaintiff's capitalization rate of eleven to twelve or defendants' capitalization rate of seven to eight is proper here. I say this because the spread is too great to be written off as being within the range of reason. If plaintiff's rate is sound then we must examine the other value factors involved. If defendants are correct then the consideration received for the assets sold was not legally inadequate when tested by this method.

The task of finding a realistic capitalization rate is fraught with difficulties. Moreover, it can be misleading if the figures are used apart from the facts surrounding the particular corporation involved. See 1 *Dewing, Financial Policy of Corporations* (1953) p. 287 et seq.; *Bonbright, Valuation of Property*, p. 262, et seq. It is therefore appropriate now to consider the old company before discussing capitalization rates. The original business in partnership form was established in 1855. It became a corporation in 1893. It has always been a "family" controlled business and that has been the basis of some of its difficulties in recent years. It was engaged in the manufacture of heavy printing presses and was one of the major producers in the industry. The industry is admittedly characterized by substantial "ups and downs". This firm had a very shallow top management reservoir. Its profits history has been reasonably good and its plants adequate. In the past three years it also manufactured rocket parts for the Navy but the future of this operation is highly speculative.

Appendix A

Having in mind that this is an old family managed heavy industry business, it is now in order to consider possible capitalization rates applicable to this type of industry.

Mr. Dewing in his work on Financial Policy of Corporations describes the various rates and I believe the old company would come under the class discussed in the following quotation from Vol. 1, p. 388, (Fifth Edition):

> "Businesses which have been established for some time, but are of a highly competitive character, belong to the next class. This would include corner grocery stores operated by managers of such superior business ability that they survive over a considerable period of time. It would include factories manufacturing goods under patent and trademark monopolistic conditions—large factories making stable merchandise with heavy investment in machinery so that the establishment of competitors is difficult and costly. Such businesses, because of large assets, have a comparatively easy access to investment capital. Corporations of this character have a value of from eight to seven times the normal earnings—the earnings capitalized on a 12½% to 15% basis."

Under the circumstances I think it reasonably clear that the old company here would come within the quoted material and reasonably justify a seven or eight times normal earnings capitalization rate. I recognize that this problem is not one calling for the automatic application of certain figures. Certainly a range of reason is involved. Compare *Jacques Coe* v. *Minneapolis-Moline*, 31 Del. Ch. 368, 75 A. (2) 244. Consideration of the corporation here involved does not call for any extreme variation in the rate. Even plaintiff's expert recognized that the company's normal business fluctuated greatly. This tends to depress the rate. Moreover, the purchaser's approaches to valuation of the

assets included that here adopted. It must therefore be considered in determining fair value. See *Allied Chem. & Dye* v. *Steel & Tube*, above.

The use of the capitalization rate range suggested by defendants is found to be reasonable. Its use results in a going concern value not grossly disparate to the purchase price. It follows that the plaintiff has failed to sustain her burden of showing that the assets were legally undervalued when viewed from a going concern viewpoint.

Plaintiff places independent reliance on the disparity between book value and the sale price as tending to show legal inadequacy. The sale price was $3,194,448. The book value of the assets sold was $6,539,345. Plaintiff's expert fixed a liquidation value of $5,110,000 on these assets. But these values are subject to substantial question because they include inventories which have a very limited value except when completed. They also include assets which waranted a tax refund because they had depreciated substantially from their book value.[3] Also the value ascribed to the plants and equipment is "anybody's guess" when you consider their value apart from the purpose for which they were used. I cannot find a disparity of the type required to condemn the sale. My conclusion applies also to the alleged liquidation value argument.

This was a sale of assets case which was inevitably headed for court. The history of the relationship between the plaintiff and management made it inevitable. If it were the court's function to pass upon the wisdom of the sale, I would be presented with a more difficult task. The

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[3] Parenthetically, I agree with plaintiff that the tax refund cannot be added to determine the fairness of the sale price. It came not in partial payment by the purchaser for any assets purchased but from the loss arising from the price at which the assets were sold. I have therefore not used the tax refund in determining the adequacy of the sale price. However, I do not intend this to mean that the tax consequences are to be ignored in determining the overall wisdom of the decision to sell.

human relations problem is real when a family controlled corporation is involved and certain members have obtained a living from it while the minority members waited for their benefits and then saw the business sold to strangers. But this court is not permitted under law to substitute its idea of the proper course of conduct for those having control where there has been statutory and equitable compliance with the pre-requisites to a sale of the assets.

It will take a stronger case than is here made to justify the inference that the majority stockholders accepted a price grossly disparate to the value of the assets sold. The possible additional benefits flowing to them by virtue of the sale cannot reasonably compare with the capital loss they have suffered if plaintiff's valuation argument is correct. This is not conclusive but it tends to negate the argument that the majority was not seeking the "high" dollar in making the sale.

I conclude that the plaintiff failed to sustain her burden of showing that the assets of the old company were sold for a legally inadequate price.

In view of my conclusion with respect to the validity of the sale from the viewpoint of the old company it necessarily follows that there is no liability on the part of the purchaser—Harris. Moreover, I am convinced that, regardless of the correctness of my conclusion regarding the selling corporation and its directors, the purchasing company purchased the assets in an arms-length transaction. I find no evidence to support the charge that it purchased the assets with knowledge of a violation of a fiduciary duty by the directors of the selling company.

I regret that my prolonged commitments do not permit me to narrate the facts and my conclusions at greater length and with greater particularity. I have tried to set forth those matters which upon examination seem of primary importance.

It follows that there is no merit to plaintiff's complaint and it will therefore be dismissed.

Order on notice.

Appendix A

Final Order

(Filed October 4, 1955)

This 4th day of October, 1955, this cause having come on to be heard on final hearing upon the pleadings, the testimony of witnesses, the exhibits and the depositions filed in this cause, and the matter having been fully argued by counsel for the respective parties both orally and on briefs after final hearing, and having been maturely considered by the Court, it is, for the reasons stated in the opinion of this Court dated September 28, 1955,

ORDERED that the complaint be and the same is hereby dismissed and judgment be and it hereby is entered in favor of the defendants.

Costs in the amount of $153.96 are hereby taxed against the plaintiff.

/s/ COLLINS J. SEITZ
Chancellor

APPROVED AS TO FORM:

/s/ ARTHUR G. LOGAN
Attorney for Plaintiff

APPENDIX B

Brief of Plaintiff-Appellant Filed with Supreme Court of the State of Delaware (pp. 21-25)

As an additional reason for relief, plaintiff submits that:

> 8 Del. Ch. §271 is unconstitutional as applied to a dissenting stockholder of a corporation formed prior to its enactment.

This latter argument will be considered first.

* * *

The Delaware statute, 8 Del. C. § 271, permitting the sale of corporate assets without the consent of all the stockholders was originally enacted in 1917. The Old Company was incorporated in Delaware in 1914.

Prior to the enactment of the statute, the common law rule required assent of all stockholders in the sale of its assets.

> *Geddes* v. *Anaconda*, 254 U. S. 590, 41 Sup. Ct. 209 (1921);
> *Allied Chemical & Dye Corporation* v. *Steel & Tube Co. of America*, 14 Del. Ch. 64, 122 A. 142 (1923).

This statute cannot be given retrospective effect so as to deprive holders of stock which was outstanding prior to 1917 of rights which they held at that date.

> *Allen* v. *Francisco Sugar Co.*, 92 N. J. Eq. 431, 112 A. 887 (Ct. of Errors and Appeals, 1921).

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In the *Allen* case a statute permitting the lease of corporate assets with consent of the holders of two-thirds of the stock, was enacted after the corporation was organized. The Court held that the plaintiff stockholder could obtain an injunction to prevent the corporation from leasing its property even though his stock was acquired after the passage of the statute permitting such lease.

No subsequent statute may destroy any vested rights which the stockholders may have had as of the date of incorporation, and no statute may authorize a majority of the stockholders to destroy such rights.

Keller v. *Wilson & Co.*, 21 Del. Ch. 391, 190 A. 115 (Sup. Ct. 1936);

Consolidated Film Industries Inc. v. *Johnson*, 197 A. 489 (Sup. Ct. 1937);

Wessel v. *Guantanamo Sugar Co.*, 134 N. J. Eq. 271, 35 A. 2d 215 (Ch. 1944) aff'd per curiam 135 N. J. Eq. 506, 39 A. 2d 431 (Err. & App. 1944).

There is impliedly written into every corporate charter in this State, as a constituent part thereof, every pertinent provision of our Constitution and statutes.

Peters v. *U. S. Mortgage Co.*, 13 Del. Ch. 11, 114 A. 598;

Morris v. *American Public Utility Co.*, 14 Del. Ch. 136, 122 A. 700.

The retroactive effect erroneously given the Delaware statute in this case violates State and Federal constitutional provisions under a line of cases which goes clear back to the case of *Trustees of Dartmouth College* v. *Woodward*, 17 U. S. 518.

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The *Dartmouth College* case held that a corporate charter constitutes a contract between the State and the corporation and that the Constitution protects such contract against alteration by the State. By way of dicta, however, it was stated that the State could through charter provision reserve the power to amend the charter. Since that time, corporate charters (including that of C. B. Cottrell & Sons Company) have reserved such power to the State.

The State, therefore, has the right to amend charters (and by analogy to amend provisions of the corporate law) in so far as such amendment affects the contract between the State and the corporation. Of course, corporate law had undergone drastic revisions since the *Dartmouth College* case, and corporations are no longer organized by special charter enacted by the legislature. To the extent, however, that a charter still constitutes a contract between the State and the corporation, and subject to various limitations, the State may alter such contract.

The Delaware Courts recognize that a corporate charter is a contract between the State and the corporation, a contract between the corporation and the stockholders, and a contract between the stockholders inter sese.

Morris v. *American Public Utilities Co.*, 14 Del. Ch. 136, 122 Atl. 696.

We are dealing here with a relationship between stockholders and not with a relationship between the corporation and the State. The powers reserved to the State in corporate charters do not extend to the contract among the stockholders. Such contract may be altered by statute only when the public interest clearly demands such alteration and the intent to make the statute retrospective is clearly expressed therein.

Thus, the law as it existed in 1914 is a part of the contract entered into between stockholders at that time. The State and Federal Constitutions prevent the impairment of such contract, and the provisions against deprivation of property without due process of law protect the plaintiff against this type of sale.

When the charter was filed, certain rights became vested in the stockholders and their successors in title which the statute has not revoked. The right of a stockholder to continue to be a stockholder and to have a share in the corporate enterprise which he chose to invest in is surely a fundamental right of which the stockholder cannot be deprived without either (1) statutory authority existing prior to the issuance of the stock, or (2) a statute expressly providing for retroactive application because the "public interest" demands such deprivation of rights.

The leading Delaware case limiting the retroactive application of statutes affecting corporate charters is *Keller v. Wilson*, 21 Del. Ch. 391, 190 Atl. 115 (1936). In this case, the corporation was not permitted to amend its charter to cancel accrued unpaid preferred dividends without the consent of the stockholder since the stock had been issued at a time when the law did not permit such cancellation. The right to the dividends was declared to be "a vested right of property secured against destruction by the Federal and State Constitutions". The excellent note in 69 *Harvard Law Review* 538 (1956) refers to most of the authorities on this point.

Although the constitutional points raised here were not argued below, it is proper that the Court consider them. Mr. Justice Wolcott stated in *Richards v. State*, — Del. —, —, 77 A. 2d 199, 202 (Del. Supr. 1950).

> "Ordinarily, appellate courts will not consider questions which have not been fairly presented to the

court below. We think this is the proper rule, and we further think the question presented to us was not fairly presented below, nor were the usual exceptions made to preserve the defendant's right to raise the question by Writ of Error. However, the rule, that matters not presented at the trial may not be raised on review, is subject to two exceptions—(1) when the question is one of jurisdiction of the subject matter, and (2) when a question of public policy is involved. *Cf. Walter* v. *Keuthe*, 98 N. J. L. 828, 121 A. 624. Since the defendant seeks to raise here a question of the application of certain constitutional guarantees which has never been passed on by this Court, we are constrained to permit him to do so under the public policy exception to the rule, even though the objection was made below at best by implication."

The plaintiff's constitutional rights are violated by section 271 as applied to her equity in the family corporation. It is clear that this Court may take cognizance of such violation.

Appendix B

Reply Brief for Plaintiff-Appellant Filed with Supreme Court of the State of Delaware (pp. 16-20)

I

Defendants claim that the constitutional point may not be raised because it was not argued below.

This Court has considered constitutional points not passed on previously when not raised below upon the grounds of public policy. *Richards* v. *State*, 45 Del. 573; 77 A. 2d 199, 202. In the *Richards* case Justice Wolcott said:

> "Since the defendant seeks to raise here a question of the application of certain constitutional guarantees which has never been passed on by this Court, we are constrained to permit him to do so under the public policy exception to the rule, even though the objection was made below at best by implication."

Public policy is the question of the application of constitutional guarantees and not as Defendants state, "whether the assets of a single corporation should or should not be sold."

Defendants agree that in any case plaintiff may not raise the point since she was not a stockholder in 1917 when the law was passed.

Plaintiff received her stock from her father's estate, Edgar H. Cottrell, who died in 1922. (R. p. 25). From 1901 until six months before his death Edgar owned fifty per cent of the stock of the old Company. (R. p. 28). Plaintiff was thus a stockholder prior to the effective date of the enactment of the Statute by operation of law. This is sufficient to enable her to assert this right. Even though this is so, it has been held that she need not have been a stockholder as of the

time of the passage of the Statute. *Allen* v. *Francisco Sugar Co.*, 92 N. J. Eq. 431, 112 A. 887 (Ct. of Errors and Appeals, 1921).

Defendants point out that under the sections of the corporation law as it existed in 1914 plaintiff could be deprived of her interest in the corporation through the dissolution or merger of the corporation. They seem to argue that she therefore has no greater rights in the sale of assets than she had in dissolution. Plaintiff freely admits that there are many other things that could have been done in respect to her stock under other laws. Indeed it is possible that the entire corporation was subject to seizure under certain federal war statutes which existed in 1917. Statutory limitations on her rights under one procedure do not limit her statutory and constitutional rights in an entirely different procedure.

At the time of the incorporation of C. B. Cottrell & Sons Company in Delaware in 1914 there was no need to provide in the Charter for 100% stockholder consent before selling the business assets. This was provided by law. Plaintiffs purpose in now invoking this law, as indeed is the purpose of this law suit, is to preserve the family enterprise to obtain recession of the sale to Harris-Seybold.

Defendants further contend that plaintiff is merely being deprived of a voting right or a right to veto, and §242 permits alterations of voting rights. This argument ignores the fact that §271 granted new powers in respect to sale of assets. This is not a mere change in voting rights but rather a new procedure introduced into our law whereby sales of all assets of profitable corporations could be made without unanimous consent.

Allied Chemical & Dye Corporation v. *Steel Tube Co. of America*, 14 Del. Ch. 1, 120 A. 486 (1923), 14 Del. Ch. 64, 122 A. 142 (1923);
13 *Am. Jur., Corporations, Sec. 428.*

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The argument also ignores the fact that the rights of stockholders in respect to the sale of assets is not one of the rights which are listed in §242 as being subject to change. This is important under the ruling in *Keller v. Wilson & Co.*, 21 Del. Ch. 391, 190 A. 115 (Sup. Ct. 1936) where as here the change sought was not permitted under §242.

Defendants further contend that since many of the decided cases deal largely with the rights of stockholders to accumulated preferred dividends, the principles therein set forth do not apply to other rights of stockholders. The learned studies by Horace Stern, now Chief Justice of the Supreme Court of Pennsylvania, on *The Limitations of the Power of a State under the Reserved Right to Amend or Repeal Charters of Incorporation*, XLIV American Law Register, 1, 73, 142 (1905) make it abundantly clear that the principles limiting the power of the State to alter the agreements between stockholders apply to many situations other than those of preferred stockholders. The same article also points out (at p. 92) the limitations in the applications of *Looker v. Maynard*, 179 U. S. 46 (1900) so heavily relied upon by Defendants.

Defendants seem to misunderstand the scope of the constitutional point when they state (DB 2 p. 13) that the New Jersey court never reached the constitutional point in *Allen v. Francisco Sugar Co.*, 92 N. J. Eq. 431, 112 A. 887 (1921). The court did decide that the state's reserved power did not extend to a change in the contract of the stockholders *inter sese*. Since the rights surrounding the sale of assets are rights between the parties in which the state has no interest it is perfectly clear that Defendants' attempt to apply a subsequent statute so as to deprive a stockholder of rights which she previously had would be unconstitutional.

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The State could not require an existing unincorporated association whose by-laws limit the sale of assets to sell assets merely because a majority of its members voted to do so. It cannot by mere reservation of a right to amend a charter force such changes on existing corporations since the stockholders have already agreed to these matters between themselves. Section 271 is not constitutional as applied to the sale here in question since it did not exist when the corporation was formed. At the time of incorporation the stockholders accepted the law as it then existed knowing that the law might be changed but also knowing that the reserved right to change the law did not carry with it the right to destroy existing argument in so far as the state was not a party to such arguments. As Horace Stern suggests (*op cite* at p. 93) nothing short of a repeal of that section of the Federal Constitution which forbids the impairment of the obligation of contracts can give to the State any control over the charters in so far as these represent contracts between the stockholders.

Defendants urge a Montana case *Allen* v. *Ajax Mining Co.*, 30 Mont. 490, 77 Pac. 47 (1904), decided about 17 years prior to *Allen* v. *Francisco Sugar Co.*, 92 N. J. Eq. 431, 112 A. 887 (1921), as being directly opposed to the New Jersey case. We believe the Montana case to be wrong but there are many distinguishing factors:

1. The Montana statute specifically stated that it was to apply to mining corporation whether organized before or after the passage of the act (Such language is conspicuously absent from the Delaware statute, 34 Del. Laws, Ch. 112, §13 (1917).)

2. A two-thirds vote of the stockholders was required for the sale and dissenters had a right to be paid the appraised value of their shares.

Under the Delaware cases a dissenting stockholder must do more than show that the price is inadequate in or to set aside a sale. No Court of equity can ignore the more favorable position of a dissenter in Montana.

Defendants also rely on *Goldman* v. *Postal Telegraph, Inc.*, 52 F. Supp. 763 (D. Del. 1943), where a change in a corporate charter was permitted. In that case, however, the change had been authorized under Section 26 (now §242) of the corporation law. Furthermore, in that case, which involved the purchase of the Postal Telegraph Company by Western Union, the Court found there was a public interest in the efficiencies and decrease in waste that would accompany the merger of our only nation-wide telegraph utilities. It is clear that changes in the corporate charters may be proper when there is an important public interest at stake in the particular transaction. An important public policy is at stake here as to the protection of plaintiff's constitutional rights but the public has no special interest in the sale of this particular small business.

As a further argument, there is no indication in the statute that the legislature intended to have it apply to corporations formed prior to its passage.

APPENDIX C

8 Del. C. § 242. *Amendment of certificate of incorporation after payment of capital or where corporation has no capital stock*

(a) Any corporation of this State existing prior to the tenth day of March, 1899, whether created by special act or general law, or any corporation created under the provisions of this chapter, may, from time to time, when and as desired, amend its certificate of incorporation by—

(1) Addition to its corporate powers and purposes, or diminution thereof, or both; or

(2) Substitution of other powers and purposes, in whole or in part, for those prescribed by its certificate of incorporation; or

(3) Increasing or decreasing its authorized capital stock or reclassifying the same, by changing the number, par value, designations, preferences, or relative, participating, optional, or other special rights of the shares, or the qualifications, limitations or restrictions of such rights, or by changing shares with par value into shares without par value, or shares without par value into shares with par value either with or without increasing or decreasing the number of shares; or

(4) Changing its corporate title; or

(5) Making any other change or alteration in its certificate of incorporation that may be desired.

Any or all such changes or alterations may be effected by one certificate of amendment.

Every certificate of incorporation as so amended, changed or altered, shall contain only such provisions as it would be lawful and proper to insert in an original certificate of incorporation made at the time of making such amendment.

(b) Whenever issued shares having par value are changed into the same or a greater or less number of shares without par value, whether of the same or of a different class or classes of stock, the aggregate amount of the capital of the corporation represented by such shares without par value shall be the same as the aggregate amount of capital represented by the shares so changed; and whenever issued shares without par value are changed into other shares without par value to a greater or less number, whether of the same or of a different class or classes, the amount of capital represented by the new shares in the aggregate shall be the same as the aggregate amount of capital represented by the shares so changed.

(c) The certificate of amendment of any certificate of incorporation effecting any change in the issued shares of the corporation shall set forth that the capital of the corporation will not be reduced under or by reason of the amendment.

(d) Every amendment authorized by subsection (a) of this section shall be made and effected in the following manner—

(1) If the corporation has a capital stock, its board of directors shall adopt a resolution setting forth the amendment proposed, declaring its advisability, and calling a meeting of the stockholders entitled to vote in respect thereof for the consideration of such amendment. The meeting shall be called and held upon such notice as the certificate of incorporation or by-laws of the corporation shall provide, or, in the absence of such provision, upon notice thereof to each stockholder so entitled to vote either delivered to such stockholder or mailed to him at his post-office address, if known, at least ten days before the date fixed for the meeting. The notice shall set forth such

amendment in full or a brief summary of the changes to be effected thereby, as the directors shall deem advisable. At the meeting a vote of the stockholders entitled to vote, by ballot, in person or by proxy, shall be taken for and against the proposed amendment, which vote shall be conducted by two judges, appointed for the purpose either by the directors or by the meeting. The judges shall decide upon the qualifications of voters, and accept their votes, and when the vote is completed, count and ascertain the number of shares voted respectively for and against the amendment, and shall declare whether the persons or bodies corporate holding the majority of the voting stock of the corporation (or of each class of stock entitled to vote thereon, when such vote is to be taken by classes) have voted for or against the proposed amendment; and shall make out a certificate accordingly, stating the number of shares of stock, issued and outstanding and entitled to vote thereon, and the number of shares voted for and the number of shares voted against the amendment respectively, and shall subscribe and deliver the certificate to the secretary of the corporation. If it appears by the certificate of the judges that the persons or bodies corporate holding the majority of the stock of the corporation entitled to vote (or of each class of stock when such vote is to be taken by classes) have voted in favor of the amendment, a certificate setting forth the amendment and certifying that such amendment has been duly adopted in accordance with the provisions of this section shall be made under the seal of the corporation and signed by its president or a vice-president, and its secretary or an assistant secretary and the president or such vice-president shall acknowledge the certificate before an officer authorized by the laws of Delaware to take acknowledgments of deeds. The certificate, so executed and acknowledged, shall be filed in the office of the Secretary of State, and a copy thereof, certified by the

Secretary of State, shall be recorded in the office of the recorder of the county in which the original certificate of incorporation is recorded; or if the corporation shall have been created by special public act of the legislature, then the certificate shall be recorded in the office of the recorder of any county where the business of the corporation may be conducted. Upon filing and recording the same, the certificate of incorporation of the corporation shall be deemed to be amended accordingly. If any proposed amendment would alter or change the preferences, special rights or powers given to any one or more classes of stock by the certificate of incorporation, so as to affect such class or classes of stock adversely, or would increase or decrease the amount of the authorized stock of such class or classes of stock, or would increase or decrease the par value thereof, then the holders of the stock of each class of stock so affected by the amendment shall be entitled to vote as a class upon such amendment, whether by the terms of the certificate of incorporation such class be entitled to vote or not; and the affirmative vote of a majority in interest of each such class of stock so affected by the amendment shall be necessary to the adoption thereof, in addition to the affirmative vote of a majority of all other stock entitled to vote thereon. The amount of the authorized stock of any such class or classes of stock may be increased or decreased by the affirmative vote of the holders of a majority of the stock of the corporation entitled to vote, if so provided in the original certificate of incorporation or in any amendment thereto which created such class or classes of stock or in any amendment thereto which was authorized by a resolution or resolutions adopted by the affirmative vote of the holders of a majority of such class or classes of stock.

(2) If the corporation has no capital stock, then the board of directors, managers, trustees, or the governing

body thereof shall pass a resolution declaring that every addition, change or alteration is advisable, and if at a subsequent meeting, held not earlier than 15 days and not later than 30 days from the meeting at which such resolution has been passed, two-thirds of the whole number of the board of directors, managers, trustees, or the governing body, shall vote in favor of such amendment, addition, change or alteration, a certificate thereof shall be signed by the president or a vice-president and secretary or assistant secretary (or by such officers as may be duly authorized to exercise the duties, respectively, ordinarily exercised by the president or vice-president and secretary or assistant secretary of a corporation) under the corporate seal, acknowledged by the president or vice-president (or by such officer as may be duly authorized to exercise the duties ordinarily exercised by a president or vice-president) before any officer authorized by the laws of this State to take acknowledgment of deeds to be the act and deed and certificate of such corporation, and such certificate acknowledged as aforesaid, together with the assent of two-thirds of the whole number of the members of the board of directors, managers, trustees, or governing body in writing, shall be filed in the office of the Secretary of State, and a copy thereof duly certified by the Secretary of State shall be recorded in the office of the recorder of the county in which the original certificate of incorporation is recorded; or, if the corporation shall have been created by a special public act of the Legislature, then the certificate shall be recorded, as above provided, in the county where the corporation has its principal place of business, and upon filing and recording the same, the certificate of incorporation shall be deemed to be amended accordingly. The certificate of incorporation of any such corporation without capital stock may contain a provision requiring any amendment thereto to be approved by a specified number or percentage of the

members or of any specified class of members of such corporation in which event only one meeting of the board of directors, managers, trustees or the governing body thereof shall be necessary, and such proposed amendment shall be submitted to the members or to any specified class of members of such corporation without capital stock in the same manner, so far as applicable, as is provided in this section for an amendment to the certificate of incorporation of a stock corporation; and in the event of the adoption thereof, a certificate evidencing such amendment shall be filed and recorded in the same form and manner, so far as applicable, as is provided in this section for an amendment to the certificate of incorporation of a stock corporation.

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IN THE

Supreme Court of the United States

October Term, 1957

No. 316

HELEN E. COTTRELL,

Appellant,

—v.—

THE PAWCATUCK COMPANY (formerly the C. B. Cottrell & Sons Company) a Delaware Corporation (known as the Old Company), HARRIS-SEYBOLD COMPANY, a Delaware Corporation, DONALD C. COTTRELL, RIDLEY WATTS, ARTHUR M. COTTRELL, JR., CHARLES P. COTTRELL, JR., and THE COTTRELL COMPANY, a Delaware Corporation (known as the New Company),

Appellees.

APPELLANT'S BRIEF OPPOSING APPELLEES' MOTION TO DISMISS APPEAL

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Appellees.

APPELLANT'S BRIEF OPPOSING APPELLEES' MOTION TO DISMISS APPEAL

This brief is filed by appellant so as to be helpful to the Court in correcting the erroneous statements contained in Appellees' Motion to Dismiss and Brief in support thereof.

I.

The appeal should not be dismissed for lack of jurisdiction.

Appellees suggest that this Court lacks jurisdiction because "• • • there was no decision in the Supreme Court of Delaware holding the statute in question valid" (A. p. 5).*

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* Note: Reference to Appellant's Jurisdictional Statement will be thus: JA p. 1. Reference to Appellees' Motion to Dismiss and Brief in Support Thereof will be thus: A. p. 1.

As to appeals under 28 U. S. C. § 1257(2), the validity of the state statute should be drawn in question and the decision should be in favor of its validity.

The purpose of this requirement is to restrict the United States Supreme Court's mandatory jurisdiction on appeal. No judgment of a state court will be reviewed on appeal by the Supreme Court unless the highest court of the state has first been apprised that a state statute is being assailed as invalid on federal grounds, or, when the statute as applied, is so assailed until it has opportunity authoritatively to construe it. In order to support an appeal to this Court it is necessary that the validity of the state statute "has either been presented for decision to the highest court of the state • • • or has in fact been decided by it • • •." *Wilson* v. *Cook*, 327 U. S. 474, 480-482 (1946).

Granted there is no explicit decision by the Delaware Supreme Court on the validity of this state statute, its decision nevertheless amounts to a holding of validity by implication.

Dahnke-Walker Milling Co. v. *Bondurant*, 257 U. S. 282,
Largent v. *Texas*, 318 U. S. 418.

In accordance with the appeal procedure in Delaware, the question was presented by appellant in her initial brief. It was amplified in her reply brief filed in response to appellees' brief discussing the question.

Thus the Delaware Supreme Court was apprised of the question and by its refusal to consider the question has by implication sustained the validity of the statute.

II.

In any event the appeal papers should be regarded and acted on as a petition for certiorari. (28 U. S. C. § 2103.)

Where it is not apparent to the Court that there was a decision holding the state statute valid,[1] or that validity could be presented as a question for the first time on appeal to the highest state court,[2] this Court has treated the appeal papers as a petition for writ of certiorari.

[1] *Wilson* v. *Cook*, *supra*, at p. 482.

[2] *Memphis Gas Co.* v. *Beeler*, 315 U. S. 649, 651 (1942).

In *Memphis Gas Co.* v. *Beeler*, *supra*, Mr. Chief Justice Stone, delivering the opinion of the Court, noted that appellant had failed to establish that under the state procedure a challenge to a statute's validity could be availed of if advanced for the first time before the highest state court, and further, that the decision of that court was void of any reference to such a challenge. He added:

> "Since it does not appear that the validity of the statute was either drawn in question or passed upon in the trial court or deemed by the state supreme court to be in issue, we must dismiss the appeal for want of jurisdiction. Treating the papers on which the appeal was allowed as a petition for writ of certiorari; as required by section 237(c) of the Judicial Code as amended, 28 U. S. C. § 344(c), 28 U. S. C. A. § 344(c), certiorari is granted and we proceed to consider the merits of the case." (315 U. S. at p. 651)

III.

Petition for certiorari should be granted because of the conflicts of law and the importance of the issues involved.

Without elaborating unduly the grounds set forth in the appellants' Jurisdictional Statement, it is noted that adequate grounds for the granting of petition for certiorari exist in this case because of a substantial question of conflict between the rulings of this Court and the law of the State of Delaware, and because of the importance of the issues involved.

1.

Conflicts

This Court has determined in *Geddes* v. *Anaconda*, 254 U. S. 590 (1921), that unanimous consent of stockholders is necessary to the sale of the assets of a profitable corporation. This is so because of an implied contract among the stockholders that a corporation will pursue its chartered purpose.

The legislature of Delaware has by 8 Del. C § 271, attempted to authorize the substitution of majority for unanimous consent in such cases.

Appellees have told this Court that the legislature of Delaware can, with the added blessing of Delaware case law, invade this contract right of stockholders because "• • • the reserved power of the state is all embracing • • •" (A. p. 14). Approving authorities, including Delaware cases, are cited, while note is made that the New Jersey view in *Allen* v. *Francisco Sugar Co.* (N. J. Ct. Er. & App. 1921) 29 N. J. Eq. 431, 112 A. 887, is contrary.

Appellees would have the Court affirm a usurpation of power by the state legislature under the guise of "reservation".

Such power is not conceivable for it would amount to power of circumventing the United States Constitution.

2.

Importance

The questions raised by appellant are of substantial importance.

There is a direct State challenge to the Constitution of the United States; broad matters of corporate action are involved, as are immediate, substantial property interests; and a litigant has been unreasonably denied a judicial consideration of a question that goes to the very root of the case.

As to the latter, no doubt exists that this Court has the power to examine into the raising of the Federal question to determine if the highest state court's refusal to deal with that question is a mere evasion.

Rogers v. *Alabama*, 192 U. S. 226.

If the Court is convinced that the highest state court's refusal to consider a federal question amounts to an avoidance of the federal right, it may assume jurisdiction.

Williams v. *Georgia*, 349 U. S. 375.

As Mr. Justice Frankfurter in *Williams* v. *State of Georgia*, said,

> "A state procedural rule which forbids the raising of federal questions at late stages in the case, or by any other than a prescribed method, has been recognized as a valid exercise of state power.[6] The principle is clear enough. But the unique aspect of the never-ending new cases that arise require its individual application to particular circumstances. Thus, we would have a different question from that before us if the trial court had no power to consider Williams' constitutional objection at the belated time he raised it. But, where a State allows questions of this sort to be raised at a late stage and be determined by its courts as a matter of discretion, we

are not concluded from assuming jurisdiction and deciding whether the state court action in the particular circumstances is, in effect, an avoidance of the federal right? A state court may not, in the exercise of its discretion, decline to entertain a constitutional claim while passing upon kindred issues raised in the same manner." (349 U. S. at p. 382)

The Supreme Court of Delaware attempted to evade a determination of the validity of the state statute, 8 Del. C. § 271, as against the United States Constitution, by a completely unreasonable limitation of its own previously announced rule.

The question of constitutionality was raised on appeal by appellant, briefed by both appellant and appellees, and was a matter of law not dependent on the facts. It was, in effect, nothing more than a further ground of illegality which formed the basis of her suit.

She sought rescission of the contract because of its illegality for the reason that the action of the directors and majority stockholders amounted to deliberate disregard of the minority's interest or a reckless indifference thereto. The basis of this illegality was that the consideration of $3,116,070 was grossly inadequate being:

1. less than 1/4 of the insurance value of $13,000,000;

2. less than 1/3 of the replacement cost of $10,400,000;

3. less than 2/5 of the going concern value of $7,700,000;

4. less than 2/5 of the book value plus good will of $7,250,000;

5. less than 3/5 of the liquidation value of $5,110,000.

The Supreme Court of Delaware acting as an appellate court for appeals from the Court of Chancery acts *de novo*; in short, it has full power to consider the case as if raised in its Court for the first time.

Weinberg v. *Baltimore Brick Company* (Del. Supreme Ct. 1955) 112 A. 2d 517.

Its power, therefore, is full and it may consider such questions if it desires to. In 1950 it apparently limited its discretion by adopting a rule that it will not consider questions not considered below except questions involving jurisdiction and public policy.

Rickards v. *State* (Del. Supreme Ct. 1950), 6 Terry 573, 77 A. 2d 199.

Mr. Justice Wolcott stated the general rule in the *Rickards'* decision noting the two exceptions. He went on to state that a question of constitutional guarantee never before considered by the Court could be raised for the first time on appeal under the public policy exception. He did not say that this would be limited to criminal cases, adding in fact a citation to a New Jersey case, *Walter* v. *Keuthe*, 98 N. J. L. 828, 121 A. 624, which concerned a civil matter.

The same Mr. Justice Wolcott, a member of the Court deciding the instant case, in a later case, *Kerbs* v. *California Eastern Airways* (Del. Supreme Ct. 1952), 90 A. 2d 652, speaking for the Court in 1952, allowed a statute to be considered for the first time in the case on the ground that as illegality was generally claimed below, this only added an additional ground thereof.

The same Mr. Justice Wolcott, along with the same members of the Court deciding appellant's case, as late as 1955 held, in *Weinberg* v. *Baltimore Brick Co.*, *supra*, that on appeals from the Court of Chancery the Supreme

Court of Delaware has power to fully examine the entire record to determine the correctness of the result reached below and may therefore, decide issues not reached below. The Court, *Per Curiam*, said,

> "Appellants move to strike the brief as improper, contending that upon appeal from the denial of a preliminary injunction, even though the decision settles rights, only the precise question decided by the court below is before us for review.
>
> This contention is unsound. On appeal from Chancery this Court has power to examine the entire record for the purpose of determining the correctness of the result reached below. It has therefore power to decide issues not reached below." (112 A. 2d 517)

Of equal importance here is that the Court was not consistent under its *Rickards* rule. It did not allow appellant to raise the constitutional question on the ground of its not having been raised below, but in the same breath, allowed her to question for the first time the Chancellor's decision on the point that he had not added the liabilities to the capital earnings value in determining final value though that objection was not made by appellant below. The Supreme Court considered this point stating,

> "Finally, plaintiff argues that the Chancellor failed to take into account, in arriving at an evaluation of the assets sold, the Old Company's liabilities. This argument we are unable to follow." (JA p. 31)

• • •

This question is of greatest importance to this case, for if the statute is illegal, action thereunder is equally so, leaving a contract of sale of no validity.

The really serious point is: just what is the Delaware rule on raising questions for the first time on appeal; and has not the court in fact refashioned the rule to eliminate the plaintiff!

• • •

Appellees state that this alleged violation of the Fourteenth Amendment by refusal to consider the constitutional point should have been presented in appellant's petition for re-argument.

Granting that appellant made no specific reference to the 14th Amendment of the United States Constitution in her petition for re-argument, the very wording of the petition was of itself a clear indication to the court that she felt its decision was unreasonable (text of petition appears in A-appendix 1, pp. 21-26).

Appellant therein indicated the complete unreasonableness of the Court's failure to apply the *Rickards* rule, adding that no compelling reason existed for such denial when the point was a matter of law, not dependent on the facts, and fully briefed by both parties. These are the same reasons appellant now puts forth as establishing unconstitutionality.

The Delaware court was in effect fully apprised of the matter as required by the rule of *Wilson* v. *Cook, supra.*

There is nothing that she could have added thereto except the words—"violation of the 14th amendment." There is no valid reason to assume that such an incantation would have in any way altered the court's opinion.

The petition having alleged the same grounds appellant now uses to support unconstitutionality, its denial by the Delaware court equals as a practical matter a denial of the consideration of her Federal right.

Here the unexpected opinion of the court on this point, followed by an equally unexpected denial of reargument, amount for all practical purposes to a cut off of appellant's right to have this question heard. To deny her the chance to raise the question now would be in the words of Mr. Justice Holmes—"a mere concession to technicality."

Saunders v. *Shaw*, 244 U. S. 317, 319 (1917).

• • •

Conclusion

The unconstitutionality of the Delaware statute as applied to a profitable corporation has not been raised before as, almost without exception, the cases concerned the sale of assets of unprofitable corporations. There is no doubt existing that in such cases majority stockholders' consent is sufficient.

This case squarely poses the question of the applicability of such a statute to a profitable corporation.

The issue is of such importance that it must be met.

WHEREFORE, appellant respectfully moves that appellees' Motion to Dismiss be denied and appellant's appeal be granted.

Respectfully submitted,

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JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1957.

No. 316.

HELEN E. COTTRELL,

Appellant,

v.

THE PAWCATUCK COMPANY (formerly the C. B. COTTRELL & SONS COMPANY) a Delaware Corporation (known as the Old Company), HARRIS-SEYBOLD COMPANY, a Delaware Corporation, DONALD C. COTTRELL, RIDLEY WATTS, ARTHUR M. COTTRELL, JR., CHARLES P. COTTRELL, JR., and THE COTTRELL COMPANY, a Delaware Corporation (known as the New Company),

Appellees.

MOTION TO DISMISS AND BRIEF IN SUPPORT THEREOF.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1957.

No. 316.

HELEN E. COTTRELL,

Appellant,

v.

THE PAWCATUCK COMPANY (FORMERLY THE C. B. COTTRELL & SONS COMPANY), A DELAWARE CORPORATION (KNOWN AS THE OLD COMPANY), HARRIS-SEYBOLD COMPANY, A DELAWARE CORPORATION, DONALD C. COTTRELL, RIDLEY WATTS, ARTHUR M. COTTRELL, JR., CHARLES P. COTTREL, JR., AND THE COTTRELL COMPANY, A DELAWARE CORPORATION (KNOWN AS THE NEW COMPANY),

Appellees.

MOTION TO DISMISS.

Appellees in the above entitled case move to dismiss the appeal on the ground that the Court is without jurisdiction under 28 U. S. C. § 1257(2), or 28 U. S. C. § 1257(3).

OPINIONS BELOW.

The opinion of the Supreme Court of Delaware is reported in 128 A. 2d 225. The opinion of the Court of Chancery of Delaware is reported in 116 A. 2d 787. Copies of the above opinions and judgments thereon are attached to Appellant's Jurisdictional Statement as Appendix A.

QUESTIONS PRESENTED.

1. Since the Supreme Court of Delaware refused to decide the constitutionality of the Delaware statute governing sale of corporate assets because appellant had failed to raise the question in the trial court, does the Supreme Court of the United States have jurisdiction of the case under U. S. C. § 1257(2), on which appellant relies?

2. If this court has no jurisdiction under U. S. C. § 1257(2) and appellant relies on U. S. C. § 2103 under which in certain cases an appeal may be regarded and acted on as a petition for writ of certiorari, does this court then have jurisdiction under U. S. C. § 1257(3), in view of the fact that appellant in the trial court made no claim of right under the United States Constitution and in accordance with prevailing state practice in the State of Delaware, the Supreme Court of that state refused to consider the constitutionality of the Delaware statute in question?

STATEMENT OF THE CASE.

Appellant, a minority stockholder, brought an action in the Court of Chancery of Delaware to enjoin the sale by C. B. Cottrell & Sons Company[1] (Old Company) of its operating assets to Harris-Seybold Company. Appellant did not obtain a restraining order or preliminary injunction preventing consummation of the sale, and on December 10, 1954, the sale was completed. Actually the assets were sold to a wholly-owned subsidiary of Harris-Seybold Company, referred to throughout the proceedings as the New Company.

After the consummation of the sale the case was tried in the Court of Chancery where appellant sought rescission of the contract and restoration of the status quo. Alternatively she sought damages against the directors of the Old

1. Later its name was changed to The Pawcatuck Company.

Company, against Harris-Seybold Company, and against the New Company.

Appellant claimed in the trial court that the assets of the Old Company had been sold for a legally inadequate price and that the directors and majority stockholders had acted in reckless disregard of the rights of minority stockholders by accepting a price grossly disparate to the value of the assets sold. The Chancellor considered each of appellant's arguments on the merits, determined that there had been compliance with both the statutory and equitable pre-requisites of a sale of corporate assets, and ordered the complaint dismissed.

Appellant appealed to the Supreme Court of Delaware, asserting again that the assets of the Old Company had been sold for a legally inadequate price. In accordance with the Delaware practice in sale of assets cases, the Supreme Court reviewed in detail all of the evidence touching on valuation which had been adduced before the Chancellor, and concluded that in determining to sell the assets and in fixing the price thereof the directors and majority stockholders had acted within the reasonable limits of business judgment.

In addition to raising in the Supreme Court of Delaware the contentions which she had made unsuccessfully in the Court of Chancery, appellant advanced for the first time the contention that the 1917 Delaware statute authorizing the sale of all of the assets of a corporation by vote of the majority of the voting shares was unconstitutional if applied to the Old Company, because its charter antedated the statute. This question the Supreme Court of Delaware expressly declined to consider, stating in its opinion (A-31) that it had many times been ruled in Delaware that questions not fairly raised in the court below will not be considered on appeal.

Having found no evidence of illegality in the sale, and having determined that appellant's attempt to raise the

constitutional question came too late, the Supreme Court of Delaware affirmed the judgment of the Court of Chancery.

Appellant then petitioned for reargument as permitted by Delaware practice, urging that the Court should have passed upon the constitutionality of the statute. However, appellant made no contention in her petition for reargument that the refusal of the Court to pass upon the constitutionality of the statute was an unconstitutional deprivation of due process of law and equal protection of the laws in violation of the 14th Amendment of the United States Constitution. The pertinent portions on appellant's petition on this question appear in Appendix 1 of this Motion to Dismiss. Reargument was refused.

Thereafter appellant brought this appeal. In her Jurisdictional Statement [2] appellant contends again, as she did initially in the Supreme Court of Delaware, that 8 Del. C. § 271 is unconstitutional. Moreover, appellant advances for the first time a new contention, namely, that the refusal of the Supreme Court of Delaware to pass upon the constitutionality of 8 Del. C. § 271 was itself an act which unconstitutionally deprived her of due process of law and equal protection of the laws in violation of the 14th Amendment of the United States Constitution.

---

2. Referred to herein as J. S.

ARGUMENT.

I.

Under U. S. C. § 1257(2) the Appeal Should Be Dismissed for Lack of Jurisdiction.

U. S. C. § 1257 provides:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * *
>
> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.
>
> * * *"

In the trial of this case in the Court of Chancery of Delaware, appellant made no claim that § 271 of the Delaware Corporation Act (8 Del. C. § 271) enacted in 1917 was unconstitutional in its application to the Old Company. That question was raised for the first time in appellant's brief filed in the Supreme Court of the State of Delaware. In accordance with Delaware practice, the court declined to consider that question, on the ground that questions not fairly raised in the court below would not be considered on appeal. It follows, therefore, that the United States Code section above quoted affords no ground for appellant's appeal to the United States Supreme Court because there was no decision in the Supreme Court of Delaware holding the statute in question valid. Whatever may be the reason why there was no decision in the final state court on the constitutional question is immaterial here. Appellant argues at length that in accordance with the practice pre-

vailing in Delaware, the Supreme Court of that state should have passed on the constitutional question and that its failure to do so is itself a denial of appellant's rights under the United States Constitution. These contentions are immaterial so far as jurisdiction to entertain the appeal is concerned. If we are wrong on this point, then reference is made to the next portion of this brief in which we discuss these questions on the basis of considering the appeal as a petition for certiorari.

II.

If the Appeal Is Considered as a Petition for Certiorari, Jurisdiction to Grant the Petition Is Lacking Under U. S. C. § 1257(3) on the Ground That the Claim of Constitutional Rights Were Not "Specially Set Up or Claimed" in the Trial Court.

A. The Constitutionality of the Statute.

The General Principle.

The case of *Memphis Gas Co. v. Beeler*, 315 U. S. 649 (1942) ably expresses the principle of law applicable to the instant case:

> "It is true that when this case reached the Supreme Court of Tennessee the appellant included in its brief, which has been certified as part of the record here, a statement of its legal position which might serve as a challenge to the validity of the statute. But appellant has failed to establish that under Tennessee practice such a contention can be availed of if advanced for the first time in the appellate court, . . ."
>
> ". . . Since it does not appear that the validity of the statute was either drawn in question or passed upon in the trial court or deemed by the state supreme court to be in issue, we must dismiss the appeal for want of jurisdiction. . . ." (315 U. S. at 651)

This principle has found continued favor in the United States Supreme Court from an early date. *Spies v. Illinois*, 123 U. S. 131 (1887); *Erie Railroad Company v. Purdy*, 185 U. S. 148 (1902); *Jacobi v. Alabama*, 187 U. S. 133 (1902); *Layton v. Missouri*, 187 U. S. 356 (1902); *Mutual Life Ins. Co. v. McGrew*, 188 U. S. 291 (1903); *Hulbert v. City of Chicago*, 202 U. S. 275 (1906); *Louisville & Nashville R. R. Company v. Woodford*, 234 U. S. 46 (1914); *Atlantic Coast Line Railroad Company v. Mims*, 242 U. S. 532 (1917); *Pennsylvania Railroad Co. v. Illinois Brick Co.*, 297 U. S. 447 (1936); *McGoldrick v. Compagnie Generale Transatlantique*, 309 U. S. 430 (1940); *Adler v. Board of Education of the City of New York*, 342 U. S. 485 (1952); *Michel v. Louisiana*, 350 U. S. 91 (1955).

In applying the principle as set forth above this Court has consistently accepted the opinion of the highest Court of the state from which the appeal comes in order to determine whether the state practice requires the submission of the question to the trial Court. *Erie Railroad Company v. Purdy*, 185 U. S. 148 (1902); *Layton v. Missouri*, 187 U. S. 356 (1902); *Hartford Life Insurance Company v. Johnson*, 249 U. S. 490 (1919).

The Delaware Practice.

Appellant admits that the question was not raised by her until she filed her first brief in the Delaware Supreme Court (J. S. p. 4). Under the practice prevailing in the State of Delaware this was too late.

Appeals to the Delaware Supreme Court from the Court of Chancery are governed by Article 4, Section 11(4) of the Delaware Constitution which provides:

"Section 11. The Supreme Court shall have jurisdiction as follows:

"(4) To receive appeals from the Court of Chancery and to determine finally all matters of appeal in

the interlocutory or final decrees and other proceedings in chancery."[3]

This constitutional provision was interpreted by the Delaware Supreme Court in the case of *Trout v. Farmers Trust Co. of Newark, et al.*, 19 Del. Ch. 437, 168 A. 208 (1933) to mean that, in order for the Delaware Supreme Court to take jurisdiction of a particular question,

> ". . . it must appear from the record which is sent up to this Court from the Court of Chancery that said question was raised at some stage of the proceedings in the Court of Chancery . . ." (168 A. at p. 209)

The *Trout* decision was specifically followed by the Delaware Supreme Court in *Stephenson v. Commonwealth & Southern Corporation*, 19 Del. Ch. 447, 168 A. 211 (1933) in which the Court said:

> "It is a rule of almost universal application that questions not raised and preserved for review in the trial court will not be considered on appeal. The authorities so holding are so uniform that time will not be taken for the citation of specific cases. See cases cited in 3 C. J. 689; 2 R. C. L. 69; Decennial Digest, Appeal & Error, Key No. 169-171. This was the ruling in Trout v. Farmers Trust Co. of Newark (Del. Ch.), 168 A. 208, recently determined in this court."

Trout was also specifically followed in *Shanik, et al. v. White Sewing Machine Corporation*, 25 Del. Ch. 371, 19 A. 2d 831 (1941); and in *Equitable Trust Co. v. Gallagher*, 32 Del. Ch. 401, 77 A. 2d 548 (1950).

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3. This section was renumbered by an amendment which became effective in 1951, having been formerly Section 12(4), but is otherwise identical except for one word change of no significance.

The principle has been adhered to by the Court in other cases though without specific reference to the *Trout* case:

> *Radio Corporation of America v. Philadelphia Storage Battery Co.*, 23 Del. Ch. 289, 6 A. 2d 329 (1939);
>
> *Darling Apartments Co. v. Springer*, 25 Del. Ch. 420, 22 A. 2d 397, 137 ALR 803 (1947).

It is, therefore, submitted that in the present case the Delaware Supreme Court was correctly announcing the applicable rule of practice when it stated, in declining to consider appellant's contention that the Delaware asset sale statute (8 Del. Code § 271) was unconstitutional if applied to her, that (J. S., A 31)

> "It has been many times ruled in this State that questions not fairly raised in the court below will not be considered on appeal."

In following its own consistent practice the Delaware court was certainly not acting in a spirit of evasion for the purpose of defeating a federal right.

The Rickards Decision.

Appellant's whole argument is based upon certain of the wording in the case of *Rickards v. State*, 45 Del. 573, 77 A. 2d 199 (1950).[4] There are a number of reasons why this case cannot properly be cited as authority for appellant's contention that the Delaware Supreme Court should have considered the federal question. In the first place, it was originaly tried in the Court of General Sessions and was a criminal matter. If an exception to the Delaware practice exists, it is clearly to be confined to criminal actions. This is indicated by the quotation from the decision now ap-

4. Wrongly referred to as *Richards* by appellant (J. S. 11, 12, 13).

pealed from referring to the *Rickards* case and which is included in the jurisdictional statement (J. S. 12). It is also the holding generally when exceptions to the usual rule are made.

3 Am. Jur. 293 (Appeal & Error).
State ex rel. York v. County of Walla Walla, 28 Wash. 2d 891, 184 P. 2d 577, 172 ALR 1001 (1947).
U. S. A. v. Atkinson, 297 U. S. 157 (1936).

Second, as a criminal appeal the *Rickards* case was not necessarily controlled by the *Trout* decision (*supra* p. 8) which had been originally tried on the equity side of Delaware's dual court system. That the Supreme Court considered the *Trout* rule as set out above still binding after it decided *Rickards* is indicated by the fact that *Trout* was cited as authority in *Equitable Trust Co. v. Gallagher* (*supra* p. 8), which was handed down immediately after *Rickards.*

Third, the constitutional question had been brought to the attention of the trial judge in *Rickards.*

Further, the *Rickards* decision was written by Justice Daniel F. Wolcott who was a member of the court which unanimously decided the present case, a definite indication that there exists no inconsistency between *Rickards* and the decision now appealed from.

Appellant's contention that the Delaware Supreme Court has applied "a special rule to her case in conflict with its own pre-existing rule" is without substance. It stems from appellant's misapprehension as to the content of the pre-existing rule. Faced with a similar contention of unconstitutionality in the case of *Darling Apartment Co. v. Springer, supra* p. 9, also an appeal from the Delaware Chancery Court, Chief Justice Layton of the then Delaware Supreme Court gave exactly the same answer as to what the rule was, as did Chief Justice Southerland in the case in

which review is now sought. In *Darling* the appellant sought to urge for the first time in the Delaware Supreme Court that the State Liquor Control Act was unconstitutional in that it made no adequate provision for giving license holders notice of the promulgation of its rules. Chief Justice Layton held this question, not having been raised or considered below, was "not properly before this Court and will not be determined." (22 A. 2d at 400-01).

Thus there is no basis for appellant's contention that the Delaware Supreme Court has made any change in its pre-existing rule.

B. The Alleged Denial of Equal Protection of the Laws as a Result of the Delaware Supreme Court's Decision.

We have already pointed out that the refusal of the Delaware Supreme Court to hear appellant's constitutional argument was consistent with the previous decisions of that court. If we are correct in this, there could have been, of course, no denial of equal protection to appellant.

Even if the decision sought to be reviewed here was inconsistent with that in the *Rickards* case, the failure of appellant to so claim at the time she asked for reargument in the Delaware Supreme Court is sufficient to bar her here from asserting any such right.

White River Lumber Co. v. Arkansas, 279 U. S. 692 (1929).

Whitney v. California, 274 U. S. 357, 362-3 (1927).

Hiawassee River Power Co. v. Carolina-Tennessee Power Co., 252 U. S. 341, 344 (1920).

Thomas v. Iowa, 209 U. S. 258 (1908).

III.

Even if the Court Sees Fit to Consider Appellant's Contention that 8 Del. C. § 271 is Unconstitutional as to a Corporation Whose Charter Antedates the Statute, It is Clear That the Question is Unsubstantial and the Contention Without Merit.

8 Del. C. § 364 was originally enacted in 1901, long before the incorporation of the Old Company in 1914. This section reads as follows:

> "This chapter may be amended or repealed, at the pleasure of the Legislature, but any amendment or repeal shall not take away or impair any remedy against any corporation under this chapter, or its officers, for any liability which shall have been previously incurred. This chapter and all amendments thereof shall be a part of the charter of every corporation except so far as the same are inapplicable and inappropriate to the objects of the corporation."

Thus, under § 364, the provisions of § 271 were specifically incorporated into the charter of the Old Company in 1917. This has been clearly recognized in the Delaware cases.

> *Bay State Gas Co. v. State ex rel. Content,* (Del. Supreme Ct. 1904), 4 Penn. 238, 56 A. 1114 (1904).
>
> *Gow v. Consolidated Coppermines Corporation* (Del. Ct. of Ch. 1933), 19 Del. Ch. 172, 180, 165 A. 136, 139 (1933).
>
> *Davis v. Louisville Gas & Electric Co.* (Del. Ct. of Ch. 1928), 16 Del. Ch. 157, 165, 142 A. 654, 658 (1928).

In these cases amendments to the General Corporation Law were held applicable to the charter of previously organized corporations so as to deprive holders of stock which

was outstanding before the amendments of rights which they held at the time of the amendments.

Appellant relies on *Keller v. Wilson & Co.*, 21 Del. Ch. 391, 190 A. 115 (1936), *Consolidated Film Industries, Inc. v. Johnson*, 22 Del. Ch. 407, 197 A. 489 (1937) and *Wessel v. Guantanamo Sugar Co.*, 134 N. J. Eq. 271, 35 A. 2d 215, *aff'd* per curiam, 135 N. J. Eq. 506, 39 A. 2d 431 (1944), in support of her contention that she has been deprived of a "vested right". In each of those cases, however, the question was whether a stockholder could be deprived of his right to accummulated unpaid dividends on preferred stock by amendment under § 242. The precise decision in those cases was that the cancellation of the preferential right to be paid a dividend already accrued through the passage of time was not a mere charter amendment but an attempt to destroy a right in the nature of a matured debt.[5] *Goldman v. Postal Telegraph, Inc.*, 52 F. Supp. 763, 769 (D. Del. 1943).

Allen v. Francisco Sugar Co., 92 N. J. Eq. 431, 112 A. 887 (1921), on which appellant relies, is opposed to the holdings of the Delaware cases. The quotation from *Berger v. U. S. Steel Corp.*, 63 N. J. Eq. 809, 53 A. 68 (1902), which appears at 112 A. 889 indicates that the New Jersey Court in the *Allen* case drew a strict line of demarcation separating rights as between the state and the corporation from rights of the stockholders inter sese. In *Allen* the court held that the state's reserved power did not extend to a change in the contract of the stockholders inter sese. The question of constitutionality was never reached.

The judicial limitation on the New Jersey reserved power statute has been recognized by the authorities. 1

5. It is not necessary for the purposes of the present case to consider whether *Federal United Corporation v. Havender*, 24 Del. Ch. 318, 11 A. 2d 331 (1940), casts doubt upon the holdings in *Keller* and *Consolidated Film Industries*. See *Hottenstein v. York Ice Machinery Corp.*, 136 F. 2d 944, 950 (3d Cir. 1943). It appears to have been clear to Judge Biggs in *Hottenstein*, however, that the right to receive unpaid accumulated dividends on preferred stock was not a "vested" right entitled to constitutional protection.

Thompson, Corporation (3rd ed. 1927) § 434; 7 Fletcher, Cyclopedia of Corporations (perm. ed. 1931) § 3695; Meck, Accrued Dividends on Cumulative Preferred Stocks: The Legal Doctrine, 55 Harv. L. Rev. 71, 96 (1941).

The New Jersey doctrine, however, has never been adopted in Delaware, where it has been held that the reserved power of the state is all embracing and permits alterations in the contract between the stockholders themselves. Thus in *Hartford Accident & Indemnity Co. v. W. S. Dickey Clay Manufacturing Co.*, (Del. Supreme Ct. 1942) 26 Del. Ch. 411, 24 A. 2d 315 (1942), Chief Justice Layton said:

> "The contract rights of the shareholders, in the sense of interrelations inter sese, do not rest upon an unchangeable base, but are subject to alteration under the amendatory provisions of the General Law."

Goldman v. Postal Telegraph, Inc., supra, also shows that the Delaware courts take a much more liberal view than the New Jersey Courts as to the power of the state to alter the relative rights of the stockholders inter sese by subsequently enacted legislation. Judge Leahy said (52 F. Supp. 769):

> "It is clear on principle there can be no constitutional objections to the present amendment. Since the corporation is the creature of the state, and since the corporation law is a part of the corporate charter (Peters v. United States Mortgage Co., supra), it is self-evident the state has the right to reserve to itself, or a majority or more of the stockholders, the power to change the contract between the corporation and its stockholders or between its different classes of stockholders by an amendment to the charter after such contracts are made, even if a particular class of stockholders must suffer slightly."

The statute here under attack has been in force for forty years and there is no recorded decision to the effect

that it cannot constitutionally apply to corporations then in existence. Surely if that were an open question it would have been raised long before this, because the number of Delaware corporations created before 1917 must run into many thousands. It is evident that the commercial community as well as the Bar have accepted the statute as being applicable to all corporations.

While appellant claims that before the enactment of this statute the common law in effect in Delaware was to the effect that a corporation could not dispose of all its assets unless it has obtained the approval of all of the voting shareholders, except possibly in cases of insolvency or threat thereof, it is not settled that that was the common law of Delaware. While there is a dictum to that effect in *Butler v. New Keystone Copper Co.*, 10 Del. Ch. 371, 93 A. 380, 383 (1915), it was recognized that if the business were unprofitable and the enterprise hopeless or if the charter provisions so provided, the majority could sell all the property of the corporation even against the protest of a minority. Moreover, in *Allied Chemical & Dye Corp. v. Steel & Tube Co.*, 14 Del. Ch. 1, 11, 120 A. 486, 490 (1923), the court recognized the judicial tendency at common law to uphold the power of sale for any just and reasonable cause where there was no fraud or misconduct or overreaching on the part of the majority stockholders. See also 6A Fletcher, Cyclopedia Corporations (Perm. Ed.) § 2947; 1 Morawetz Corporations (Second Ed.) § 413.

There is a respectable body of authority to the effect that apart from statute a corporation may sell all of its assets and go out of business when authorized by the directors and the holders of a majority of the outstanding shares.

Beidenkopf v. Des Moines Life Insurance Co., 160 Iowa 629; 142 N. W. 434 (1913);

Treadwell v. Salisbury, 73 Mass. (7 Gray) 393, 404 (1856);

Paterson v. Shattuck Arizona Copper Co., 186 Minn. 611; 244 N. W. 281 (1932);
Bowditch v. Jackson Co., 76 New Hampshire 351, 355; 82 A. 1014 (1912);
Halpern v. Grabosky, 296 Pennsylvania 108; 145 A. 834 (1929);
Cohen v. Big Stone Gap Iron Co., 111 Va. 468; 69 S. E. 359 (1910);
E. H. Warren, Voluntary Transfers of Corporate Undertakings, 30 Harv. L. Rev. 335, 338 (1917).

Regardless of the common law rule on this subject, the legislature of Delaware under its reserved power had authority to lay down a statutory rule on this subject. It is apparent that appellant is merely complaining of an impairment of her voting rights, i.e., the power of a minority stockholder to veto a sale of corporate assets. But voting rights of shareholders of a corporation are a proper subject for legislative action, as applied to both existing and new corporations. For example, in *Looker v. Maynard*, 179 U. S. 46 (1900) a statute which gave shareholders the right to vote cumulatively was upheld as applicable to existing corporations, even though it deprived the majority of the shares of the power of electing the whole board, as cumulative voting permits proportional representation. In *Polk v. Mutual Reserve*, 207 U. S. 310 (1907), the law was changed to permit directors without shareholder approval to incorporate a mutual life association into a regular life insurance company.

In *Miller v. New York*, 82 U. S. 478, (1873), a statute was upheld which allowed the state to increase the number of state appointed directors on a Board of Directors of a railroad.

In *Sherman v. Smith*, 66 U. S, 587 (1861), the taking away of limited liability of shareholders was held not to be an impairment of contract.

In *Allen v. Ajax Mining Co.*, 30 Montana 490; 77 P. 47, (1904), the Supreme Court of Montana upheld a statute providing for the sale of all the corporate assets without approval of all the shareholders as being applicable to pre-existing corporations. The fact that the Montana statute provided for appraisal of the shares of dissenting stockholders does not distinguish the case, as the court stated that the reserved power of the state conferred power on the legislature to enact the statute.

In *Germer v. Triple-State Natural Gas & Oil Co.*, 60 W. Va. 143; 54 S. E. 509 (1906), the Supreme Court of West Va. upheld a similar statute.

CONCLUSION.

It is submitted that the appeal here filed by appellant should be dismissed for lack of jurisdiction, whether considered as an appeal under § 1257(2) or as a petition for writ of certiorari under § 2103 and § 1257(3).

Respectfully submitted,

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(p. 18 en blanc)

APPENDIX 1.

IN THE

SUPREME COURT OF DELAWARE

HELEN E. COTTRELL,
Plaintiff Below-Appellant,

v.

THE PAWCATUCK COMPANY (formerly the C. B. COTTRELL & SONS COMPANY), a Delaware Corporation (known as the Old Company), HARRIS-SEYBOLD COMPANY, a Delaware Corporation, DONALD C. COTTRELL, RIDLEY WATTS, ARTHUR M. COTTRELL, JR., CHARLES P. COTTRELL, JR., and THE COTTRELL COMPANY, a Delaware Corporation (known as the New Company),
Defendants Below-Appellees.

No. 14, 1956 Term

Appeal from the Court of Chancery in and for New Castle County

Petition of Appellant for Reargument.

The Plaintiff-Appellant respectfully requests the Supreme Court of the State of Delaware to review and reconsider (under Rule 13) its opinion of December 21, 1956. The reasons assigned are:

First, the Court's formula of evaluation—capitalization of earnings—was incorrectly applied. This formula based on capitalization of projected future earnings can properly

be applied only to the sale of an entire business. Although defendant Harris-Seybold purchased a "going concern" which had been making profits and continued to make profits after the change in ownership with no hiatus or stoppage, it purchased less than the entire corporate entity. A going concern normally includes both liabilities and assets, however, under the instant contract of sale, only the assets were purchased. It is respectfully submitted that the assets purchased, free from all liabilities, were of greater value than the entire corporate entity. This fact was overlooked in the Court's opinion (pp. 21 & 22).

Secondly, the Court in large measure hoped to avoid the difficult problem of evaluation presented by shifting reliance away from the appraisal report submitted by Plaintiff's expert, Ford, Bacon & Davis, to an almost complete reliance upon the majority judgment of the Board of Directors of the selling corporation. This reliance was apparently based primarily upon granting the defendant directors a complete presumption of good faith and good business judgment. We submit, however, that a sales price so low that even a single director, such as the plaintiff, would have been in a position to purchase the entire assets of the corporation which we do not need to point out were greater than the corporation's net worth as no liabilities were included, was a price so low as to shock the conscience of the Court.

This obvious fact was apparently obscured from this Court by reason of undue weight and unwarranted application of the presumption of legality of any action taken by a majority of a corporation's Board of Directors and stockholders. Furthermore, presentation of an accomplished sale seeking only ratification of the Board on November 19, 1953 was far different from a president taking the initiative as he might be normally expected to do. The unusual circumstances surrounding the majority groups purchase of stock only three years prior to the sale places

them in a different category from Plaintiff and other minority stockholders who have held stock through the years. It is submitted that the predominate weight of the facts presented in the record would show that the directors were motivated by the desire for quick capital gain, without any wish to continue the profitable family venture or to sell to the minority stockholders who in the normal course of events would assume control of the corporation upo Donald's death by purchase of the stock from Donald's estate or by purchase by the corporation directly of Donald's stock.

Plaintiff wishes to point out that any cleavage between the majority and minority stemmed from the failure to pay adequate dividends and to hire members of the minority or their representative to any key management position to be trained to replace Donald upon his death. There is nothing in the record to show that the majority group had an aggressive alert approach to the future or were seeking to expand into the offset field if this were deemed advisable. The failure to pay adequate dividends through the years cannot be excused by inability to pay, as the corporation had a large accumulation of excess cash and securities. At the time of sale the Ford, Bacon and Davis report shows the excess of such assets over the above normal working capital needs of the company to be, $1,700,000 (AII, p. 36).

Thirdly, the Court erred in failing to pass upon the constitutionality of the 1917 Delaware Statute which Plaintiff submits could not be retroactive in its application to the instant corporation formed in 1914. The illegality of the sale for the failure to obtain one hundred per cent stockholders consent goes to the heart of the matter and does not raise any new or collateral issues. Under the theory of Plaintiff, urged particularly in the reply brief in the trial court, the corporation was in reality a joint family partnership venture and should be considered as such by an equity court. The constitutional argument advanced

on appeal merely supports this point. Under partnership law those partners wishing to terminate the business venture are required to first offer the assets for sale to the remaining partners.

• • •

The above reasons are more fully outlined below.

1. Use By the Court of the Principal of Capitalizing Earnings to Determine Value is Incomplete.

• • •

2. Plaintiff Should Not Be Denied the Right to Raise the Constitutional Question Here for the First Time on This Appeal.

This Court declined to consider the constitutional question on the basis that it had not been fairly raised in the Court below.

It distinguished *Rickards v. State,* 45 Del. 573, 77 A. 2 199, in which two exceptions to the general rule were noted, *viz.*: 1) where the jurisdiction of the Court was in question; and 2) in cases of public policy.

In *Rickards v. State,* the Court did not decide that the constitutional question was fairly presented to the trial judge, but to the contrary held:

> "• • • We further think the question presented to us was not fairly presented below, nor were the usual exceptions made to preserve the defendant's right to raise the question by Writ of Error" 77 A. 2 202.

The Court has thus decided to limit the *Rickards* rule to that of a criminal action where a constitutional question is involved, but there seems no compelling reason so to do where here there is a subtantial minority rights question which goes to the very heart of this case.

When the point is one of law, not at all dependent on facts that might have been presented below had the point there been raised, and both parties have briefed the point, there is no compelling reason why constitutionality may not be considered although not raised below.

4 C. J. S., Appeal and Error, Sec. 240, p. 462;
12 C. J., Const. Law, Sec. 217, (3) p. 786;
Fourth Nat. Bank v. Francklyn, 120 U. S. 747, 751, 7 S. Ct. 757, 759, 30 L. Ed. 825, 827;
Stierle v. Rohmeyer, 218 Wis. 149, 260 N. W. 647 (Sup. Wis. 1935);
Cappon v. O'Day,—Wis.—, 162 N. W. 655 (Sup. Wis. 1917);
Shaffer Oil & Refining Co. v. County Treasurer, —Okl.—, 52 P. 2, 78 (Sup. Okl. 1935);
McCabe v. Maysville, etc. R. Co., 136 Ky. 674, 124 Ky. 892 (Ct. Appeal, Ky. 1910);
Shaw v. Woodruff,—Tenn.—, 35 S. W. 2, 167 (Sup. Tenn. 1928);
Kansas City Power & Light Co. v. Town of Carrollton, 346. Mo 802, 142 S. W. 2, 849 (Sup. Miss. 1940);
Matthew v. Bailey, 198 Ark. 830, 131 S. W. 2, 425 (Sup. Ark. 1939);
Galli v. Brown, 110 C. A. 2d 764, 243 P. 2, 920 (Dist. Ct. Appeals Cal. 1952);
People v. Railway Mail Mut. Benefit Ass'n, 371 Ill. 102, 20 N. E. 2, 91 (Sup. Ill. 1939).

In *12 C. J., supra*, it is said:

"By way of exception to the general rule, however, it is the duty of a court to pass on a constitutional question, even if raised for the first time on appeal, if it appears that a determination of the question is necessary to a decision of the case."

In *Fourth Nat. Bank v. Francklyn*, 120 U. S. 747, 751, 7 S. Ct. 757, 759, 30 L. Ed. 825, 827, the Court said:

> "A mere error of law, may be considered for the first time on appeal if it involves a controlling legal principle or statute which, with respect to undisputed facts, the courts are judicially bound to know. Failure to present to the trial court that of which it is charged with judicial knowledge does not preclude its consideration for the first time upon appeal."

In the *Cappon* case, *supra*, the Wisconsin Supreme Court said:

> "We cannot agree with this contention. This court sits here to do justice between litigants. For the purpose of orderly administration, and the attainment of justice, certain rules are established. Any rule the enforcement of which results in a failure of justice should be carefully scrutinized and not blindly adhered to unless the abandonment of it will work more injustice than will follow if it be adhered to. One of the rules of well-nigh universal application established by courts in the administration of the law is that questions not raised and properly presented for review in the trial court will not be reviewed on appeal. 6 C. J. 689. The reason for the rule is plain. If the question had been raised below, the situation might have been met by the opposite party by way of amendment or of additional proof. In such circumstances, therefore, for the appellate court to take up and decide on an incomplete record questions raised before it for the first time would, in many instances at least, result in great injustice, and for that reason appellate courts ordinarily decline to review questions raised for the first time in the appellate court. But to this rule there are many exceptions. Questions as to the jurisdiction of the court may be raised. Telford v. City of Ashland,

100 Wis. 238, 75 N. Q. 1006. Questions as to the legal effect of a deed or other instrument may be raised for the first time in this court (cases). There are numerous other exceptions." 3 C. J. 740. (162 N. W. p. 657).

In the *Stierle* case, *supra,* Justice Fowler speaking for the Supreme Court of Wisconsin in a case involving property rights under the due process clause of the federal Constitution said:

"It is also urged that as the unconstitutionality of the provisions was not raised in the court below, it will not be considered here. This is a general rule, but it is sometimes 'more honored in the breach than in the observance' (cases). Whether the court will consider a point not raised below 'depends upon the facts and circumstances of the particular case.' (Cappon v. O'Day, supra, paragraph 2 of the syllabus. When the point is one of law, not at all dependent on facts that might have been presented below had the point been there raised, no compelling reason is perceived why it may not be considered on review, and no reason is perceived why the constitutionality of the provision here involved should not be now considered and decided. The point has been fully and very ably briefed by counsel on both sides by direction of the court, and nothing more could possibly have been presented below than has been presented here." (260 N. W. 654.)

In *Shaw v. Woodruff, supra,* it was held that generally, a constitutional question may be raised at any time. The Court, 2 S. W. 2 at page 168 said:

"But even courts of equity are without power to prescribe and enforce rules that conflict with or are repugnant to the Constitution."

In *Kansas City Power & Light Co. v. Town of Carrollton, supra,* the Court allowed the question to be raised,

although not in the pleadings, where it had been argued by both parties.

In *Matthews v. Bailey, supra,* the Court held that it was proper to raise the question for the first time on appeal especially where the question had been fully briefed.

3. No presumption of Good Faith Should Be Allowed.

Because of the unusual circumstances surrounding Donald's purchase of stock in 1950 it can only be assumed that he was interested primarily in merger or resale not in continuing the profitable family venture. It did not lie with Donald to criticize family businesses as he reaped all the benefits of buying at the family price of $100 a share after working in the company as an employee for 20 years. Because of reasons of age and health Donald was motivated by a desire for a quick capital gain and also to cut the minority off from obtaining control of the company on his death. These factors we submit are such as to prevent the application of the normal presumption of good faith to Donald and other majority directors under his influence and control.

Under such circumstances, the approach here differs little in essence from the holding in *Allied Chemical & Dye Corporation v. Steel & Tube Company,* 14 Del. Ch. 1, 120 A. 486.

Respectfully submitted,

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Certification.

It is hereby certified by counsel that the above petition for rehearing is presented in good faith and not for delay.

HELEN E. COTTRELL,
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